The Advocate

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Kentucky Department of Public Advocacy

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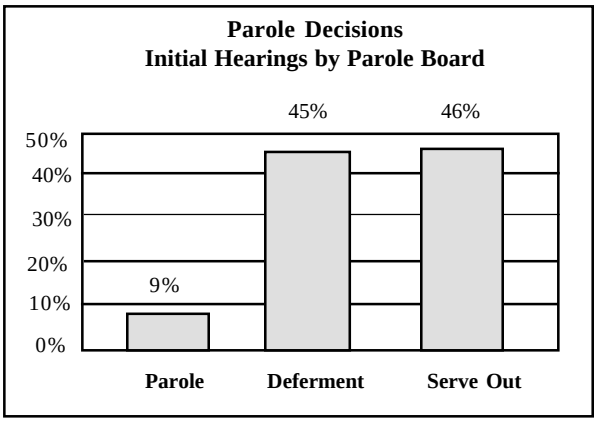
The Right to Pretrial Release



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Race to Incarcerate

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Long-Time Campbell County Defender Dies

Chuck Heidelman, who has been the Chief Public Defender in Campbell County for the Juvenile Court for 16 years died Friday August 10, 2001. Campbell County Public Defender Administrator Gerry Patten said, "He truly cared about his clients and his services will be sorely missed."

The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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FROM THE EDITOR...

Ed Monahan

An innocent person should not be jailed. Those arrested or indicted are presumed innocent. That presumption is a hallmark of our system of justice. A half century ago, Chief Justice Vinson wrote for the United States Supreme Court in *Stack v. Boyle*, 342451, 4 (1951), "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." We focus in this issue of *The Advocate* on the right to release for the citizen-accused.

The release on bond of the client must be a priority for defense counsel. Traditionally, arrest takes place to insure attendance of the accused at trial. However, a defendant who is presumed innocent is constitutionally entitled to guarantee his presence at trial other than through detention. Bail is nothing more than a defendant's secured promise to appear.

Our Kentucky Constitution is clear that there is an absolute right to reasonable bail in all cases except in some capital cases. "All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great…." Section 16 of Kentucky's Constitution. "Excessive bail shall not be required, nor excessive fines imposed…." Section 17 of Kentucky's Constitution.

The most important reason for bail is that it secures the freedom of a person presumed innocent. There are many important collateral benefits of pretrial release for the citizen who has been accused. Getting an accused out of the hands of the police is often vital to the success of the defense. Release severely limits the authorities' ability to unfairly obtain inculpatory evidence or to obtain evidence without defense, knowledge and supervision. Written and oral confessions and statements obtained through pressure are damaging to the defendant. Identification procedures and scientific testing are critical police actions. These procedures are more likely to be done fairly if the defendant is not in the exclusive control of law enforcement. Most importantly, release allows a defendant to actively and effectively assist in his defense.

This issue of *The Advocate* is dedicated to Kentucky's 217 full-time and 30 part-time Pretrial Release Officers who serve the citizens of the Commonwealth so faithfully day in and day out.

Ed Monahan
Deputy Public Advocate

Pretrial Services in Kentucky: Serving the Courts, Citizens and Accused

Pretrial Services in Kentucky celebrated our 25th anniversary of operation this year. Coinciding with this event we had our first invitation to present information about our process at the statewide Annual Public Defender Education Conference in Lexington. Anniversaries and requests to explain ourselves to outside groups leads to the inevitable reflection upon what we have accomplished, what we have failed to accomplish and what value our organization has offered the citizens and courts of the Commonwealth. In order for those of you that have not been integrally involved with the development of Pretrial Services I believe it is critical to understand how Kentucky Pretrial Services came into existence, how it operates and what we are trying to accomplish in order to make any determination of its success or failure.

At our recent statewide training conference a distinguished jurist from out of town delivered an enthralling history of bail, its development in England and how it came to be practiced in this country. I cannot begin to relate the detail or the string of cases from *Stack v. Boyle*, 342 U.S. 1 (1951) to *Abraham v. Commonwealth*, Ky., 565 S.W.2d 152 (1977) and their impact on the delivery of services in this country. My lack of legal training and common sense preclude me from trying to act as if I understood every nuance of his presentation. However, in the early 1960's there was a growing understanding that the system of bail or community release prior to trial was based on money and necessarily discriminated against indigent citizens. Since the business of the commercial bail bondsman was to make money, defendants without resources languished in jail due to this narrow interest in profit. When a court merely looked at money as the basis for bail or pretrial release, the poor were at a distinct disadvantage in obtaining release prior to trial under a system dominated by cash. Profit drove the standards of the pretrial release process instead of equal protection considerations.

The Vera Institute of Justice initiated the Manhattan Bail Project. The basis for this program was to demonstrate to the court that all defendants with community ties, beyond financial means, would likewise return if released prior to trial. Issues related to residence, employment and family contacts tied individuals to a community beyond the mere risk of losing money or the fear of being apprehended by the notorious bounty hunters employed by the commercial groups. The program was successful and resulted in a growing movement calling for the reform of bail and release on a national basis.

Kentucky's first experience with a Pretrial Release program was initiated in Fayette County in 1972 under then County Judge Robert Stephens. In the 1976 session of the Kentucky General Assembly legislation was introduced to reform the process and function of pretrial release in the Commonwealth. House Bill 254 contained all of the elements of the system we now use for releasing defendants from custody prior to trial. It was and remains the most comprehensive bail reform enacted by any state in this country. It created a statewide and centrally administered Pretrial Services program to assess community ties to provide judges individual circumstances on which release conditions could be determined. It required release on recognizance or promise to appear unless, in the courts discretion, there were specific reasons to deny such consideration. This legislation created a comprehensive deposit system with the state that allows citizens to post money and have that money returned when the obligations of appearance are met. In the boldest step it further stated that the function of commercial bail had no role in the operation of the criminal justice system; it abolished their ability to operate in the state; it made their continued activity a crime under our statutes; and it restricted the method by which bounty hunters could operate within our borders.

House Bill 254 passed both houses and was signed into law by then Governor Julian Carroll who had strongly supported this legislation. The elimination of commercial bail naturally led to an appeal by the bondsmen. The case, *Robert F. Stephens, Attorney General, et al., v. Bonding Association of Kentucky et al.*, Ky., 538 S.W.2d 580 (1976) determined the future of bail reform in the Commonwealth. I would encourage anyone with an interest to read the entire opinion as it clearly lays out the concepts and obligations of our society to continue to reform and refine the practices of the system over time. I do submit the following excerpt from the unanimous opinion written by Justice Pleas Jones based on the eloquence and strength of the statements:

> The Kentucky General Assembly found the business of commercial bail bonding detrimental to the welfare of citizens of this Commonwealth. It responded accordingly by enacting House Bill No. 254. In so doing, the legislature severed the life-sustaining cord from the respirator that gave life to commercial surety bail bonding. Instead of letting commercial sureties "die on the vine," the enactment of House Bill No. 254 permits commercial bonding companies as surety for profit go quickly and "gently into that good night." *Id.* at 584.
>
> This court refrains from nullifying House Bill No. 254. Section I of the act with its companion sections has brought reform and needed relief to the state's bail system. It violates neither the 14th

> Amendment of the U. S. Constitution nor Section I of the Kentucky Constitution. This court holds that Section I of House Bill No. 254 is constitutional.

The Pretrial Services agency began operation on June 19, 1976 providing comprehensive individual review on defendants charged with crimes to the police and county courts in Kentucky. Our "noble experiment" in bail reform began prior to the creation of the unified court system under which we now function. I refrain from relating the many war stories about the early days of our program for the purposes of this article. However, when asked every officer that began with the program can relate stories that confirm the state of the system prior to our inception. Issues related to the corruption created by the presence of commercial bail and the indigent citizens languishing in custody prior to trial are common elements to those of us that experienced the early years of the program.

When I refer to the centrally administered system of Pretrial Services it must be understood that we are employees of the Administrative Office of the Courts (AOC) under the Court of Justice (COJ). The Chief Justice appoints the Director of the AOC who then directs the General Manager of Pretrial Services. There are 57 field offices across the state, which fall into three basic categories. We have three urban programs that operate twenty-four hours a day in Fayette, Jefferson and Kenton/Campbell counties. The next classification contains seven districts referred to as mini-urban that are regularly scheduled for 12-20 hours a day in Boone, Christian, Daviess, Hardin, McCracken, Madison and Warren counties. Finally, there are 47 rural programs that cover their jurisdictions on a split schedule where services are offered without regularly scheduled hours. This flexibility has allowed our group to adapt to the varying populations and needs of the courts across the state. All of our operations are required to operate seven days a week and 365 days a year with 217 employees.

As employees of the Court of Justice both Supreme Court Rule and statutes govern our duties. I will most frequently refer to the Supreme Court Rules in defining our roles and responsibilities. RCr 4.06 defines our duties as: interviewing defendants eligible for pretrial release; verifying information obtained from defendants; making recommendations to the court as to whether defendants interviewed should be released on personal recognizance; and any other duties ordered by the Supreme Court. RCr 4.08 specifies the confidential nature of the information we collect, and the six circumstances under which it does not apply, absent waiver by the defendant. RCr 4.38 requires Pretrial Services to notify the court who remains in custody 24 hours after bail conditions are imposed. By statute we are permitted to collect Affidavits of Indigency from defendants seeking representation of the Public Defender. The remainder of our duties and how we carry out these mandates are covered by our administrative procedures.

I would like to generally note some of the elements that make the role of the Pretrial Officer unique and difficult at the same time. When we approach a defendant we are likely to be the first Officer of the Court the defendant will see in the process of adjudicating the offense with which they are charged. It is our responsibility, as Pretrial Officers, to inform every defendant on their options for pretrial release, interview them if desired, present them for release consideration, monitor their compliance with conditions of release and treat them with the dignity and respect each deserves throughout our processes. Under the Kentucky Code of Judicial Conduct, Kentucky Supreme Court Rule 4.300, Canon 3(7), we are exempted from ex parte communication with the court regarding the bail setting process. Our position within the court requires the highest ethical standards if we are to have the trust of judges, defendants, prosecutors and defense bar. Our staff cannot compel a defendant to go through an interview for consideration of release nor can we compel them to fill out the Affidavit of Indigency. All of your clients' interaction with Pretrial Services is voluntary. We have the potential to deal with every citizen that is charged with a criminal offense, their family and friends should their interest remain. Our resources to address this significant population and responsibilities preclude anything other than the most basic issues related to release prior to trial and are severely limited. This is not a justification or excuse for poor service to the court or client. It is intended to assist outside groups understand the dynamics and problems associated with performing our job well.

Pretrial Officers are required to interview and present defendants within twelve hours of arrest to a judge or trial commissioner. The recommendation for recognizance called for in RCr 4.06 has been previously defined as determination of eligibility under a standardized point system based on verified information related to the community ties of the defendant. Residency, family relationships, ownership of property, employment and prior criminal record has been assigned standard values to determine eligibility. The point system has a maximum value of 22 and the requirement of 8 to qualify for "program recommendation." The points assigned under this system presumes the defendant has a permanent verified address within the Commonwealth:

Residency:

Resident for more than one year	+5
Resident for less than one year but more than three months	+3
Resident for less than three months	+1

NOTE: At one time the residency points were based on a fifty-mile radius from the county seat of the arresting jurisdiction, but were eventually expanded to include the entire state.

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Personal Ties:

Lives with spouse, grandparents, children, parents, and/or guardian	+4
Lives with other relatives	+3
Lives with non-related roommates	+2
Lives alone and maintains residence	+1

Economic Ties (double length of employment if part-time):

Has held present job for more than one year or being a full time student	+5
Has held present job for less than one year but more than three months	+4
Is dependent on spouse, parents, other relatives, legal guardian, unemployment, disability, retirement or welfare compensation	+3
Has held present job for less than three months or is a part time student	+2

Miscellaneous: (can score in each category)

Owns property in the Commonwealth	+3
Has a telephone	+1
Expects someone at arraignment	+1

Previous Criminal Record:

No convictions on record (excluding traffic violations) in the last two years	+3
FTA on traffic offense or criminal violation in last two years	-2
AWOL on record (current military personnel only)	-3
Released from custody after felony convictions in the last two years	-5
Conviction for felony escape	-5
FTA conviction on misdemeanor in the last five years, or charged with	-10
FTA conviction on felony, or charged with	-15
Violation Monitored Conditional Release while case is pending and currently Active	-15

The following points are tallied only if the defendant is currently charged with a crime that is domestic in nature and will not apply to their future eligibility unless that charge is likewise domestic in nature:

Convicted of a crime of violence	-5
Verified alcohol or drug convictions	-5
Had an EPO, DVO, CO, or RO filed against them in the last five years	-5
Violated an EPO, DVO, CO, or RO within the last two years	-10
Currently charged with violating an EPO, DVO, CO, or RO	-15

Aside from the Domestic Violence Addendum minor alterations to this point system have occurred, over the past quarter of a century, but the system itself has never been statistically validated as an instrument in all of those years.

The points were intended to establish connection to the community and remove the Pretrial Officers "opinion" about the likelihood of return to court in order to standardize the application of our services across a very diverse state. This administrative process may not have served the process of reform as it was intended. Some within the court system have now internalized the point system into the process of review in lieu of individualized review of stability in the community. What was once a guideline has taken on a significance that was not intended twenty-five years ago. It is the verified information on the community ties that is collected by the Pretrial Officer that has the value – not the points associated with the concept. The point system can assist in making that determination – but should not be relied upon as the sole measure for consideration.

I started with Pretrial Services in 1976 and cannot tell you with absolute certainty that one defendant charged with a class A misdemeanor will appear and another will not if released on recognizance, nor do I believe any other human could do so 100% of the time. It is likewise true that one defendant with twelve points may return and another may not with the same background. Basing any decision solely on the classification of offense, penalty if convicted, number of points assigned or any other single focus cannot address the complex nature of why one individual returns and another does not. At my best I will be able to provide the court verified information that should point out the strengths or weakness of a defendants community ties, what they have done in the courts previously and what factors may allow the court to release a citizen presumed innocent on their promise to return for court or under the least onerous conditions that will likely return that person to court when required. We have started the process of expanding our internal view of what additional information can be provided to the court in addition to our standardized eligibility criteria. We will work very closely with the judges in this process. It will be very time consuming and complex to implement statewide. The ultimate goal is to provide the courts with the best information possible to meet the spirit of the Kentucky Supreme Court rules on bail.

The release decision could be approached as an alternative sentence might be formulated. The standards for release decisions have traditionally centered on appearance in court when required and on danger to the community. How these are defined in the minds of the judiciary must be addressed. Any information that can be provided to the court to establish community connection, whether through family or friends, can assist the court in making a release decision. In the absence of the perceived stability of the defendant some element must be provided to overcome this point. Whether it is a commitment from a third party to provide stable residence prior to adjudication or a commitment from a citizen that they will transport a defendant to all court appearances. These points seem basic, but many of the defendants before the court have lost this measure of family support by weight

of their recurring incidence of contact with the criminal justice system. But, if the defendant still has this level of support from their family and friends, who is bringing this information forward to the court at this time? In the absence of valid non-financial alternatives monetary bonds may be perceived as the sole option left to the courts regarding pretrial release.

The role of the public defender in attempting to secure the pretrial release of their client can assist the Pretrial Officer and improve our work in a variety of ways. Primarily, you have contact with and the trust of your client. We attempt to explain the methods of pretrial release, the information we collect and how it will be used. However, based on our position with the court and the defendants desire to appear more stable than their true lifestyle would reflect, we are sometimes provided false information by the defendant. We may be given a mailing address rather than an actual residence. This may be based on the short term spent at the actual residence, complications associated with government benefits received by one party or another, or other lifestyle issues they do not wish to make public. Likewise employment may be concealed due to disability payments, unemployment compensation, etc. that might otherwise benefit the defendant. Our information is confidential and will not be provided to the IRS, INS or other governmental entities. Explaining to your clients that absolute truth is the best position from which to work with our staff is essential.

When the Pretrial Officer or court official reviewing release conditions believes the defendant is misrepresenting the facts of their background, it creates an environment of doubt that is difficult to overcome. In addition to instructing your client to provide accurate information you may have contact and access with individuals interested in securing the release of the defendant that otherwise will not be available to us. Pretrial Services does not have the staffing to perform field verification for individuals without telephones or numbers through which contact can be made with these third parties, as is often the case with indigent clients. If you could direct them to contact the Pretrial Officer at the earliest stage of the bail setting process, useful information can generally be obtained. We are not permitted to use individuals for verification not offered by the defendant – but we can obtain information from your referrals and then seek the permission of your client to use them in validating their background.

Knowing the schedule, address and contact numbers of the Pretrial Officers in the judicial district may be critical information that is not easy to find. I was recently in Johnson County and attempted to locate the Pretrial Services phone number in the local telephone directory and could not find it. Across the state our offices are located in jails, private leases, basements, attics and sometimes in the actual courthouse. If you are interested in providing this information to a client's family or others please contact our local office or contact the Pretrial Services central office in Frankfort – I do not have to look it up in the phone book there.

Pretrial Officers are considered neutral information gathering arms of the court. We do not advocate release or detention of any defendants before the court. The Kentucky Supreme Court Rules on Bail require the release of citizens on recognizance or unsecured bail unless the judge believes the defendant will not return to court. If the judge believes the defendant may not appear on his own they may then consider the least onerous conditions of release required to assure the appearance of the defendant. Only after the exhaustion of these considerations, within the discretion of the court, should monetary requirements be set on a defendant. It was understood when these rules were approved that money was the last resort and the final means of assuring appearance. In twenty-five years of experience I have yet to see a study that proves money is required to produce a defendant for trial that has strong community ties. Still, the criminal justice system and public continue to expect high bonds to be set and defendants detained prior to trial on serious allegations of a criminal nature. When judges undergo criticism for following the rules pertaining to pretrial release by releasing on recognizance, I do not see the others in the criminal justice system standing beside them – educating the public and media – by pointing out the court is simply following the rules and that defendants comply.

On the other hand I do not see the defense bar challenging prosecutors' positions on bail or the decisions of the court when high bail has been set regardless of the defendants' community ties. I will never argue a bond reduction before a court nor will I be required to make a release decision. Perhaps I am sitting in the cheap seats, from the perspective of some, but I am wondering why this issue has not been pressed further and more frequently than it has. If the debate cannot be engaged in through the adversarial process and before the public, I wonder how public education about our unique system of justice will occur? All the information anyone would need is right out there for the world to see. In the past year I personally believe that more people were required to post money by the court than was necessary to guarantee appearance. I believe citizens that were charged with crimes could have been safely released into the community and were detained unnecessarily, many due to their lack of financial resources. I believe it is a failure of our system of justice when the only time in jail a defendant is required to serve for a crime is done while they are presumed innocent and are then released when they finally plead guilty. I believe there is much to be done.

On the other hand in the last fiscal year 35% of the defendants were released on non-financial conditions of release, 34% of the defendants were released by posting money, and 31% were not released prior to adjudication. More than half of the people released from jail were released on recognizance, unsecured bail or other non-financial conditions of release. Pretrial Services now interviews more people, have access to comprehensive criminal history information across

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the Commonwealth – including pending case information, and yet fewer people are getting released on non-financial conditions of release. In FY88 48% of the arrest population was released from custody under the supervision of our program and based on our point system. This last fiscal year only 21% were released under the same circumstances.

I believe that closer working relationships among the components of the justice system – while maintaining our individual roles and integrity – can result in better system of justice. Perhaps the "noble experiment" embodied in the most comprehensive bail reform legislation enacted in 1976 will continue to evolve to better serve the community and the criminal justice system as a whole. I believe it is time to engage in the debate about how best to refine the process that so few seem to understand. I have had the pleasure to serve the courts and citizens of this state for 25 years. Pretrial Officers have been in the jails morning and night for a quarter of a century doing great work on behalf of the public. Our kids walk the same streets, our families have been victims of crime and we all want to be safe in our homes when we get the chance to be there. Pretrial Officers are not radical anarchists that demand the jail and prison doors be opened to allow dangerous people to roam the streets. We are, for the most part, dedicated public servants that try to make the system we work in better. On their behalf I request that you do all that you can to see that the system works as it was intended. I have addressed this topic as if speaking to only the public defenders across the Commonwealth. I understand the extensive readership *The Advocate* enjoys and hope that the points expressed here begin a debate that will improve the system in which we all work. ■

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Ed Crockett is an Assistant General Manager for AOC responsible for assisting in the statewide management of the Kentucky Pretrial Services program for the Administrative Office of the Courts. This involves the selection, training and support for over 250 staff positions. Other responsibilities involve the ongoing development of information systems within the Administrative Office of the Courts as it relates to Executive branch agencies - primarily with the Justice Cabinet. Mr. Crockett has been with Pretrial Services since 1976 working as a Pretrial Officer, Unit Manager, and Information Systems Manager prior to his current position.

DISTRICT COURT COLUMN

Getting The Client Out of Jail: The Quest for a Reasonable Bail Bond

Scott West

Houston, Texas. A citizen is arrested for drunk driving at 1:00 a.m. in the morning. He is booked, charged, and jailed. His bond is set at $500.00 cash. The bond is reasonable, but it is still too much for this citizen to make. He needs to get out. He needs either to get his bond lowered or get someone to "go his bond."

There's a phone in the drunk tank. There's a list of bail-bond companies posted on wall beside the phone. Toll-free numbers. One phone call, and he has arranged for a bond from "Freedom Bail Bonds," or "Liberty Bail Bonds," or some other enterprise. For 10 to 20% of his bond amount (or whatever he can negotiate), this bonding company will post his bail.

One more phone call and he has arranged for his father, mother, wife or brother to come pay the bonding company (Visa, MasterCard and American Express accepted). The bonding agent runs to the courthouse. The court gets a full $500 secured bond, the bonding company gets its commission, and the citizen gets to get out after paying a fraction of the amount of his bond. At 9:00 a.m., the citizen is released from jail, and, after visiting the office of his bonding agent to fill out the necessary paperwork, he is free to go home.

Meanwhile, the defense lawyer has slept through the night. When he arrives at his office, he gets a phone call from his new client. He makes an appointment to meet and is immediately able to work on the defense of the case, with no bond worries or issues needing to be addressed.

Bail bonding may be the one area where the practice of criminal defense is easier in Texas than in Kentucky. Kentucky does not have bail-bond companies. They are prohibited by KRS 431.510. If a defendant wants to negotiate a 10% bond, he has to do it with the judge, not a bondsman. Thus, when the defense lawyer gets to his office, the client calls wanting a lower bail, not an appointment to discuss his case. The lawyer is not able at this time to focus on the merits of any defense – his immediate concern is trying to get the client out of jail.

This month's column discusses the law of bail and bonds, bond motions, negotiation with the Pretrial Release Officer, what happens when a client is between district and circuit court, and how to appeal a bond decision when bail has been set unreasonably high.

I. The Defendant has a *Right* to Bail (Or Some Form of Release)

A person charged with a crime other than a capital crime (and sometimes, even then) has a *right* to bail. Section 16 of the Kentucky Constitution provides:

> All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

The Kentucky Rule of Criminal Procedure 4.02 echoes the Constitution: "All persons shall be bailable before conviction, except when death is a possible punishment for the offense or offenses charged, and the proof is evident or the presumption is great that the defendant is guilty."

Except for capital offenses, some sort of bail must be set by the Court. Even in a capital case, bail must be set unless the "proof is evident or the presumption [of guilt] is great." Yet another illustration of the importance of the preliminary hearing. Although technically not a bond hearing, the evidence adduced at a preliminary hearing on a capital case is the first and best opportunity to demonstrate to the Court that the proof is not evident.

II. Bail is Only One Form of Authorized Release

Although the Kentucky Constitution provides that all offenses are bailable (except certain capital offenses), the Rules of Criminal Procedure provide for various forms of pretrial release. Pursuant to RCr 4.04, defendants can be released on personal recognizance, unsecured bail bond, or executed bail bond, all of which with or without non-financial conditions attached. Non-financial conditions must be the least onerous conditions necessary to insure the defendant's appearance as required, and can include, but are not limited to, placing the defendant in the custody of someone else, placing restrictions on travel, association with others, or place of abode during the period of release. RCr 4.12. The Court may also impose a requirement to return to custody after specified hours, allowing for the possibility of "work release" or "weekend custody." *Id.*

Executed bail bonds, or "secured" bonds can be secured (at the court's option) by cash in the full amount of the bond, a percentum deposit of up to ten percent of the full amount of the bond, stocks or bonds equal to the amount of the bond, or real property having with equity in the value of at least twice the amount of the bond. RCr 4.04.

III. Conditions for Establishing Amount of Bail

If a Court decides not to permit a release upon personal recognizance, but requires an executed bail bond, the bond must be reasonable and set after consideration of several factors, all of which are embodied in RCR 4.16 and KRS 431.525.

RCr 4.16(1) provides:

> The amount of bail shall be sufficient to insure compliance with the conditions of release set by the court. It shall not be oppressive and shall be commensurate with the gravity of the offense charged. In determining such amount the court shall consider the defendant's reasonably anticipated conduct if released and the defendant's financial ability to give bail.

KRS 431.525(1) provides:

The amount of bail shall be:
(a) Sufficient to insure compliance with the conditions of release set by the court;
(b) Not oppressive;
(c) Commensurate with the nature of the offense charged;
(d) Considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and
(e) Considerate of the financial ability of the defendant.

These standards are to be given serious consideration by the Court, and the failure to do so will result in a finding on appeal of abuse of discretion. This happened in *Abraham v. Commonwealth*, Ky. App., 565 S.W.2d 152 (1977), where the court of appeals held:

> The order reflects that the trial court considered only the nature of the offenses in fixing the amount of bail. This is a proper factor to consider in fixing the amount of bail. However, under KRS 431.525(1) and RCr 4.16(1), the trial court is also required to consider the defendant's past criminal record, his reasonably anticipated conduct if released, and his financial ability to give bail.…
>
> When there has been an exercise of discretion by the circuit judge in fixing bail, that decision will not be disturbed by this court on appeal…. However, the record should demonstrate that the circuit judge did in fact exercise the discretion vested in him under the statutes and rules. In the present case, the record shows only that the circuit judge always sets the bond at $25,000 on every theft charge. This does not constitute the exercise of judicial discretion.

Thus, even a judge's desire to be consistent and fair in setting similar bails for similar offenses will not relieve him of the consequences for ignoring the responsibility to examine the factors set forth in RCr 4.16.

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IV. When the Client Cannot Make Bail

When the client cannot make the bail that has been set by the court, the defense lawyer has two options. One option is to file a motion to reduce bond or ask for some other form of release. If you are in a jurisdiction that has home incarceration, for example, the client may ask to file a motion for that as an alternative to a reduced bond. The second option is to sit down and strategize with the Court's Pretrial Release Officer. Both options are discussed below:

V. The Motion to Reduce Bond

After 24 hours following the setting of conditions of bail, if a defendant is unable to meet the conditions, the defendant can apply for a review of those conditions (including the amount of the bail), or the court may do so on its own motion. If the Court declines to modify the bond, it shall record in writing the reasons for that decision. RCr 4.38.

A. Oral or Written?

By the time the defense attorney is retained by or appointed to the defendant, the 24 hours will have long passed, the issue of bond review already ripe. If the attorney has been hired or appointed before arraignment, the client will likely want his attorney to ask for a bond reduction at first appearance, orally. Sometimes local rule or custom will mandate that bond motions must be made in writing, but usually it is the lawyer's call to decide whether to move for a reduction immediately or wait until a well-thought-out motion can be written. Oral motions to reduce bond should be viewed as an *alternative* to filing a written motion, not an informal precursor to filing a written one. If you argue a motion orally and it is immediately denied a written motion filed the next day may not be well received by the judge.

Timing is crucial. If the lawyer has just met the defendant, and knows little about his life, his family, his assets or his criminal record, the lawyer will be ill-prepared to articulate reasons sufficient to warrant a reduction in bond. If the victim is present at arraignment screaming, or worse, crying, to the prosecutor about the horrible threats your client has made to them, counsel may wish to reconsider asking the court to release the client at that time.

On the other hand, if the jail is particularly overcrowded that day, and the judge seems to be giving most defendants benefit of the doubt on bail decisions, it might be just the right time to request relief. Counsel may not wish to waste a golden opportunity to cash in on the judge's good humor.

Knowing when and when not to argue orally is called "touch." If you do not have "touch," practice in district court long enough and you will develop it over time. Regardless of whether you have touch, however, eventually you will have to resort to filing a written motion. When you do, be careful not to overuse a "form" motion which is substantially identical in wording every time you file it. Once the court learns that each written bond motion reads virtually the same, it will lose its effectiveness. The court will know the contents of the motion by just looking at the title, and may not feel a need to read further. To combat this, I have seen some lawyers attach an affidavit to their form, and have educated the court to immediately turn to the affidavit to find the particular reasons why this defendant is entitled to bail. The usual factors (cites to rules, statutes, etc.) remain in the body of the bond motion.

One lawyer I know has seven or eight blank lines in the body of his motion, into which he hand writes the particular points he wants the judge to consider. The court just turns to that page to read the "meat" of the motion.

A "sample" motion (please do not consider it a "form" motion) follows this column. It is not intended to be anything other than an example of how bond was argued in one case.

Regardless of whether you file a written motion or make an oral one, make it the most persuasive motion possible.

B. Contents of the Motion

At a minimum, be prepared to address in the motion all of the factors listed in RCr 4.16 and KRS 431.525:

1. Bail Must Not Be Oppressive

In addition to the requirement of KRS 431.525(1)(b) and RCr 4.16(1) that bail not be "oppressive," the Kentucky Constitution mandates that bail not be "excessive." Section 17 of the Kentucky Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." "Excessive" and "oppressive" seem to mean the same thing, there being no case law which distinguishes the two terms. In fact, cases cited in the annotations to RCr 4.16 are placed under the heading "Excessive Bail" even though the statute uses the word "oppressive."

What is excessive or oppressive? How does one know when bail has been set unreasonably high?

In *Adkins v. Regan*, Ky., 233 S.W.2d 402 (1950), Kentucky's highest court held that a $5,000 bond for "breach of the peace" was "so clearly disproportionate and excessive as to be an invasion of appellant's constitutional right." From the facts of the case, it appears that the conduct if charged today would have amounted to assault in the fourth degree and terroristic threatening, although it also appears that the defendant should have had a meritorious self-defense case. The defendant in that case was prosecuted for having "cruelly beaten" his wife and having threatened his father-in-law. The defendant's version was that he had accidentally blackened his wife's eye while trying to take a knife away from her. In reviewing the amount of the bond the court stated:

> The generally recognized objective of a peace bond is not to deprive of liberty but to exact security for the keeping of the peace. Reasonableness in the amount of bail should be the governing principle. The determination of that question must take into consideration the nature of the offense with some regard to the prisoner's pecuniary circumstances. If the amount required is so excessive as to be prohibitory, the result is a denial of bail.

Apparently, then, an analysis of what is oppressive begins with an examination of the poverty or wealth of the defendant. Twenty-five thousand dollars may be nothing to a millionaire, but twenty-five hundred dollars may be far beyond what an indigent defendant can afford. In essence, the court must look at *how dear* the amount of money necessary to post bail would be to the defendant. Just as in the story of the "Widow's Mite," told in the Gospels, the smallest amount of money is a great deal to someone who owns practically nothing. Hence, the factor concerning consideration of the client's indigent status is extremely important in determining whether the set bail is "oppressive" or "excessive."

2. Financial Ability of the Defendant

Public defenders already have a head start at proving the financial ability, or more aptly, financial inability, of the defendant to pay bail. Located in the court's file will be the affidavit of indigency and the Court's signature entitling the defendant to representation by the Department of Public Advocacy. Remind the court that in order to be appointed a public defender, the court must have already found him to be a "needy person" as defined in KRS 31.100 and 31.120. Pull the order appointing a lawyer and recite the contents to the Court, illustrating the lack of income and assets, and the abundance of debts and dependents.

Hired defense lawyers must resort to other avenues to show the lack of a client's resources. Often, a person will be able to prove that he barely did not qualify for a public defender. Income tax statements, wage statements, mortgage agreements and/or rental contracts can be introduced to show low income and high debt.

The key is persuading the court that bond should be set *relative* to a person's ability to pay, and should not be a penny more than is necessary to make the client come back to court and behave himself in the meanwhile.

3. Gravity of the Offense

The prosecution often argues that the "gravity of the offense" alone necessitates a high bond. It is ineffective to argue in response that a fourth degree assault is just a *little* assault, or that theft under $300 is just a *tiny* theft. To the victim, for whom the offense is personal, the gravity of the offense is of paramount importance, and any bond which the defendant could make would be too low. Thus, when possible, it is best to attempt to refer to some sort of an independent standard to gauge the gravity of the offense charged.

A. The Uniform Schedule of Bail

Although *Abraham*, *supra*, stands for the proposition that routinely setting bail at the same amount for the same charge abrogates the judge's responsibility to examine the RCr 4.16 standards, in district court there is nevertheless a starting point for determining the appropriate bail for a given charge. Appendix A to the Kentucky Rules of Criminal Procedure is the Uniform Schedule of Bail. It is a table which provides for each Penal Code misdemeanor the possible jail time it carries, the possible fine, a recommended bail, and the 10% deposit required in the event of a percentum deposit bond. The bail recommendations range from $50.00 to $2,000.00.

There are also bail recommendations for misdemeanor drug offenses found in KRS Chapter 218A, and traffic violations in KRS Chapter 189.

RCr 4.16(3) makes it clear that the Court's use of the uniform schedule of bail is permissive, not mandatory. However, in the event the Court in his discretion refuses to set bail in the amount prescribed by Appendix A, he must record his written reasons for his deviation. RCr. 4.20(2).

B. DUI's

There are no recommendations for driving under the influence in the Uniform Schedule of Bail; it expressly provides that in "DWI" cases, "the bond shall be set by the court." Nevertheless, the schedule can be used as a reference to other similar offenses. Menacing, for instance, carries a recommendation of $1,000 bail with the percentum deposit being $100.

You can also gauge the gravity of a DUI by reference to the penalty imposed. Argue that a third offense is tantamount to a Class A misdemeanor, and that bond for a third offense should be set commensurate with Class A misdemeanors in the bond schedule. Likewise, first and second offenses should be set commensurate with a Class B misdemeanor.

If the judge is still reluctant to lower the bond, it may be helpful to refer to KRS 431.523 which limits the amount of bail that can be set in a DUI case for an out of state motorist. Non-residents of Kentucky charged with a DUI – regardless of whether it is their first, second, third or fourth – cannot be set higher than $500, unless there is an accident involved in which there is physical injury or property damage, in which case bail shall be set at $1,500. In the event of serious physical injury or death, bond must be set at $5,000.

Argue that it would be unfair for the district judge to set a bond higher for the residents of his own jurisdiction than he would be able to under the law if the defendant were from outside the state. Surely the residents of the county are *at least* entitled to the same protections afforded those from other states.

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C. Felonies

If your charge is a felony, obviously, the Uniform Schedule of Bail will not be helpful. However, you can find a standard by checking the bails set by the circuit judge for identical offenses and use those bails as a basis for comparison. Alternatively, you can check the bonds set by district judges in neighboring jurisdictions to see if your judge generally sets bails higher or lower by comparison.

4. Past Criminal Acts of Defendant

If your client is being charged with his first offense, you will want to trumpet this to the court. However, if your client has a list of priors as long as your leg, you probably do not want to be the one to go out of your way to point out your client's criminal history to the Court. But the Judge will know about it, and the prosecutor will know about it, so you therefore have to be prepared to say something about it.

If the defendant has always made his court appearances, it is worth mentioning. If he has a spotted record of attendance, let the prosecutor dig that information up. Focus your attention on his most *recent* pattern of attendance, and see if that improves the overall average. Remember how in your job interview you pointed out how well you did during your *senior* year of college?

Distinguish any prior acts from the present one by arguing that the nature of the offense is not like previous ones. In *Abraham*, the Court held that a judge must consider "the nature of his prior criminal record." It is noteworthy that the Court did not hold that a judge must merely consider the *length* of the record. If your client is charged with his first theft case, and his priors consist primarily of public intoxication, argue that he essentially is a first time offender for a crime of this nature. Likewise, if this is your client's first assault charge, a history of misdemeanor theft should not be used to support the Commonwealth's attention that "if he is released, he will steal again."

5. Reasonably Anticipated Conduct of the Defendant

This factor is the "catchall" or "softball" factor for the defendant. Virtually any reason for release can be squeezed into this factor. The prosecutor will argue that the reasonably anticipated conduct of the defendant is that he will flee, or he will commit the same offense again. Therefore, any fact or event which argues to the contrary is fair game.

The Court in *Abraham* chastised a trial judge for failing to consider certain facts which were relevant to determining the reasonably anticipated conduct of the defendant in that case:

> [T]he order of September 13, 1977, does not indicate that the trial court considered Abraham's length of residence in Kentucky and at his present address, his marital status, his employment record, the date and nature of his prior criminal record, or his ability to raise $75,000.00 in bail. All of these factors would be relevant to a determination of the conditions of Abraham's release….
>
> In addition, the order provides no basis for believing that $75,000 bail is the least onerous condition reasonably likely to insure Abraham's appearance at trial. RCr 4.12

These considerations of marital status, length of residence in the jurisdiction, and employment factors, while not separately listed in RCr 4.16, or KRS 431.525, are nevertheless relevant to help establish the defendant's "reasonably anticipated conduct if released." Thus, when a prosecutor argues that certain factors urged by defense counsel in support of a bond reduction (such as the defendant's medical condition) are beyond the scope of RCr 4.16 and ought not to be considered, *Abraham* allows counsel to argue those factors as being relevant to the issue of reasonably anticipated conduct of the defendant.

Other factors which might also establish anticipated conduct could be the medical condition of family members whom the defendant is obligated – legally or morally – to support, ties to the church or community, a promising job prospect, the fact that he will lose social security disability payments if he is incarcerated longer than thirty days, or any other factor unique to an individual which supports an argument that he is more likely to stay in the community rather than flee the jurisdiction.

6. Unpersuasive Factors

Listed within the Department of Public Advocacy's *District Court Practice Manual* are some unpersuasive reasons to lower bond, things *not* to argue in court. Some of these are gems:

- Defendant has to take care of his grandmother (but this doesn't slow down his party schedule or keep him from getting arrested monthly);
- Defendant professes to have a chronic illness (but his hobbies are drinking, fighting, hunting, fishing, fast women and fast cars);
- Defendant has to care for children (but her children are in juvenile court for dependency and truancy);
- Defendant has a doctor's appointment (because he got his wife to set one before he came to court);
- Defendant has bad nerves (After two terms on the bench, the judge probably feels pretty jumpy herself).

Sometimes you recognize an unpersuasive reason the moment it comes out of your mouth. While I have never been scolded by a judge for asking for a bond reduction, I came pretty close once when I asked the judge to release my client on home incarceration, which costs a defendant $280 a month to rent the leg bracelet. The defendant was in jail for failing to pay $200 a month in child support. The absurdity seems

so obvious in retrospect, but at the time…. Never mind.

A. How Many Motions?

If at first you don't succeed, how many times should you try again? As many times as a change in factual circumstances permit, subject to trying the patience of the court. The person who was once deemed a flight risk by the court might appear less a risk if the defendant's mother suddenly falls ill with a terminal illness. If a person charged with a DUI has just today served enough time to match the sentence that is usually given in exchange for a guilty plea, the Court might be more inclined to release him than he was a week ago.

RCr 4.40 allows either party to apply in writing for a change of conditions of release any time before trial. The motion shall state the grounds on which the change is sought. This rule anticipates that release has been granted, but there is no reason why a relevant change in circumstances cannot justify filing another motion for bond reduction when there has been no release.

VI. The Pretrial Release Officer

The problem with arguing bond motions is that it is so *public*! The prosecutor is there to argue against a bond reduction, the victim is sometimes there, policemen may be there, others in the public are watching, and it just seems so futile, sometimes, to ask for a bond reduction with that kind of audience. If only we could talk to the judge, by himself without all those people watching, maybe we could persuade him to lower the bond. But that would be an improper *ex parte* communication, wouldn't it? We learned very early not to do that.

Talking to the Pretrial Release Officer is the next best thing. RCr 4.06 specifies the duties of the pretrial services agency authorized by the Administrative Office of the Courts, and provides that the agency is to serve the trial court "including interviewing defendants eligible for pretrial release, verifying information obtained from defendants, making recommendations to the court as to whether defendants interviewed should be released on personal recognizance and any other duties ordered by the Supreme Court." This rule practically invites a lawyer to supply information about his client to the officer.

Not talking to the Pretrial Release Officer before filing a bond motion is a missed opportunity. You can bet that prosecutors talk to the officer whenever they want someone to stay in jail! Too often, a defense attorney will make the mistake of mischaracterizing the role of the Pretrial Release Officer to that of being an adjunct of the police or prosecution. The Pretrial Release Officers I know pride themselves on their ability to get reasonable bonds for inmates. They view defendants as clients, just as defense lawyers do. Every Pretrial Release Officer I have ever worked with has always been willing and available to listen to my begs, whines, gripes, complaints, logic, and twisted logic about why my client should be let out of jail. Then, after hearing all my hyperbole, they have been willing to sit down and frankly and rationally discuss the issue of getting the client out. If I can arm him or her of the reasons why the court should let my people go, chances are he or she will be better able to persuade the court than I could. They measure their success in their work by how well they are able to get a bond amount with conditions tailor made to the individual. After all, it takes no creativity or imagination to do nothing and simply let a person rot in jail with a high bond.

Pretrial Release Officers get to talk to the judge one on one without prosecutor or defense counsel being present. They are skilled at getting the right bond set. They know *when* to talk to the court. If the court is leaning toward not lowering a bond, the Pretrial Release Officers generally know why. If the judge wants a defendant to have a job prospect lined up before he is let out, the Pretrial Release Officer is the first to know that. What is the mood of the judge today – is he more like Santa Claus, or more like the Grinch? Pretrial Release Officers *know.*

Once you have your arguments for release lined up, go to the Pretrial Release Officer and discuss them before you file them in a motion or argue them orally. At best, you will have an ally who has the judge's ear to carry your banner for you. At worst, you will have a sounding board who can advise you of the strengths and weaknesses of your argument before you make it in the courtroom.

In the Hazard Public Defender office, every lawyer knows that the first step to getting a client out of jail is to call Ms. Ruth Combs, Perry County's Pretrial Release Officer.

VII. Between District Court and Circuit Court – "No Bonds Land"

Many times the first contact a public defender has with a client is after arraignment, just prior to a preliminary hearing on a felony. If the client is bound over to a grand jury, the question becomes "who sets the bond?"

Sometimes, local rule or custom will take care of this problem. In some jurisdictions, the Circuit Court immediately sets bonds for bound-over defendants, and any motions to reduce must be made in the Circuit Court. Other jurisdictions do not employ a local rule on the issue. At least one jurisdiction of which I am aware seems to leave the answer to the question in limbo. The district court will not set a bond because he feels he has lost jurisdiction to do so. The circuit court will not set a bond because she believes that jurisdiction is still vested in the district court, and she is abstaining from overriding a decision of the district court.

The attorney in a jurisdiction which does not have a protocol for setting bonds of bound-over defendants is in a dilemma.

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If both courts have made it perfectly clear that they will not consider setting bail, what can be done?

First of all, the issue of who has jurisdiction to set a bond must be settled. The short answer is, both courts do. KRS 24A.110(3) provides in pertinent part:

> The district court has, **concurrent with circuit court, jurisdiction to….commit the defendant to *jail* or hold him to bail** or other form of pretrial release. [Emphasis added.]

Under this statute, then, either court may exercise jurisdiction over bail.

RCr 4.54(1) provides that when a defendant is bound over, "control over bail taken by the district court shall pass immediately to the circuit court." However, this rule does not divest the *jurisdiction* over bail given by KRS 241.110 – it merely provides that the circuit judge's rulings trump the district judge's rulings in the event of a conflict. The district court does not lose jurisdiction over a case brought up in its court until an indictment is issued.

In *Hamblem v. Commonwealth*, Ky., 628 S.W.2d 345 (1981), the court addressed the issue of jurisdiction upon an indictment:

> This appeal involves a question that has not previously been determined by our Court; that is, whether the issuance of an indictment on a felony charge places sole jurisdiction in the circuit court, thereby terminating jurisdiction in the district court….
>
> Prior to the issuance of the indictment, the district court's jurisdiction included the power to reduce the felony charge to a misdemeanor but once the indictment came down, the district court could no longer dispose of the felony charge….
>
> Therefore, we hold that once the indictment issued, the district court no longer had power to make a final disposition of the case.

Thus, by implication, up until the time of indictment the district court has the power to dispose of any case or rule on any issue in the case. This would include any case bound over but on which an indictment has not yet been issued.

If neither judge will set a bond while the defendant is between district and circuit court, file a motion in district court and assert *Hamblem* as authority. If the judge overrules the motion for lack of jurisdiction, "appeal" it to the circuit court (see below). Once the issue is in circuit court, one of two things must happen. Either the circuit judge will reverse the district court, who will then have to set a bail, or the circuit court will affirm the district court, in effect recognizing that it is the circuit court which is obligated to set bail.

VIII. When All Else Fails: "Appealing" the Bail Amount

Ultimately, the defense lawyer will have a client unable to post bond at the amount set, and a judge who is unwilling to lower the bond. At that point the only option left is to "appeal" the bond.

"Appeal" is in quotation marks because an appeal of a district court's bail decision is by writ of *habeas corpus* to the circuit court, rather than by appeal. RCr 4.43(d)(2) provides that "the writ of *habeas corpus* remains the proper method for seeking circuit court review of the action of a district court respecting bail. Appeal of a circuit court's bond decision, however, is still by notice of appeal consistent with RCr 12.04.

Be not afraid – be *very* not afraid – to appeal a bond decision. If you have a good faith belief that bond has been set unreasonably high, or that the statutory, mandatory factors have not been reviewed, file an appeal.

Writs of *Habeas Corpus* are governed by KRS Chapter 419.

IX. Conclusion

A day without a reasonable bond is like a day without sunshine. Jail is dark, and damp, and cold, and crowded, and confining. It's that way every minute of the day. That is why the client in jail calls so often wanting to see what his lawyer has done toward getting him out that day.

We can improve our practice in this area. We can solidify our relationships with the Pretrial Release Officers who are also interested in getting their clients out of jail. We can reacquaint ourselves with the law governing bail bonds and hone our skills at persuading the judges to let our clients go. The sooner you get your client, who is presumed innocent, out of jail, the more time you have to work on the merits of the defense.

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COMMONWEALTH OF KENTUCKY
_____ DISTRICT COURT
CASE NO. _____

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **MOTION FOR BOND REDUCTION**

THE CLIENT DEFENDANT

Comes now The Client, through counsel, and moves the Court to reduce the bond, presently set at $5,000 cash, to the sum of $500.00 to be posted at 10% of said sum, or $50, and for grounds says as follows:

1) The Client has been charged with theft by unlawful taking, under $300, a Class A misdemeanor. He has been jailed since his arrest one week ago. He is unable to bond out at the present bail setting. Mr. Client respectfully requests this court to reconsider the amount of bail.

2) **Standards for setting bail.** KRS 431.525 provides that the amount of bail court shall be: (1) sufficient to insure compliance with the conditions of release set by the court; (2) not oppressive, (3) commensurate with the *nature* of the offense charged, (4) considerate of the past criminal acts of defendant, (5) considerate of the reasonably anticipated conduct of the defendant if released, and (6) considerate of the financial ability of the defendant.

3) **Sufficient to insure compliance with the conditions of the court.** $5,000 is more than sufficient to insure compliance with any condition placed by the court. However, a lesser amount would also be sufficient to insure that compliance. Mr. Client cannot afford to forfeit $500 anymore than he could afford to forfeit $5,000. Moreover, Mr. Client realizes that to fail to comply with any condition of the court (such as failing to maintain lawful behavior) would cause him to forfeit his bond and return to jail

4) **Not oppressive.** Section 17 of the Kentucky Constitution states that "excessive bail shall not be required" of a defendant. RCr 4.16 provides that bail shall be sufficient to insure compliance with the conditions of release set by the court, but shall not be "oppressive." A $5,000 cash bond is excessive and oppressive for Mr. Client, who lives well below poverty level. Factor 6 below shows the financial inability of the client to meet this bond.

5) **Commensurate with nature of the offense charged.** RCr 4.16 also provides that bail shall be commensurate with the gravity of the offense charged. The Offense, Penalty and Bail Schedule for Misdemeanors suggests that bond for Theft By Unlawful Taking be set at $500.00, a 10% deposit being $50.00. Five hundred dollars with a ten percentum deposit would not therefore be out of line with what the legislature has determined to be an appropriate bail.

6) On the other hand, $5,000 exceeds by at least $3,000 the highest bail recommended by the schedule for any Class A misdemeanors, whether it is an act of violence such as 4th degree assault ($2,000), sexual abuse 2nd degree ($2,000), or even jury tampering ($2,000).

7) While RCr 4.20 allows the court to exercise its reasonable discretion not to set bail in accordance with the amounts set in the schedule, there are no compelling reasons for the court to do so in this case.

8) **Past criminal acts.** Mr. Client's past criminal record consists wholly of public intoxications and a DUI. However, this is his first theft charge. His prior record does not show a lifetime of theft or other acts of dishonesty. Moreover, he has never been charged or convicted of a felony. Finally, Mr. Client would point out that while his record contains many convictions for AI and DUI between 1993 and 1995, there are only two convictions in the last four years. Mr. Client requests that this court not hold his prior record against him in making the decision whether to lower his bail.

9) **Reasonably anticipated conduct if released.** As for Mr. Client's reasonably anticipated conduct, the Court should take notice that he has always appeared whenever he was charged with PI or DUI, and has proven himself not to be a flight risk. Moreover, as the presently charged conduct is a misdemeanor, not a felony, it is unlikely that he would risk a felony charge for fleeing to avoid a misdemeanor. Mr. Client is a longtime resident of this County and has extensive ties with the community. His wife lives and works here. His parents are both residents and provide him a home at no charge. Finally, Mr. Client would assert that he pledges not to commit any further offenses if his bond is reduced.

10) **Financial ability of the defendant.** As for Mr. Client's financial ability to give bail, counsel would point out that Mr. Client has already been found by this court to be indigent. Mr. Client's only source of income is a small, monthly disability check for $440.00 from SSI which he will lose if he is jailed for a period of time longer than 30 days. He has no assets. He lives on food stamps. In short, he is poor.

WHEREFORE, the Defendant respectfully moves the Court to release him upon Defendant's posting of bond in the amount of 10% of $500.00, or $50.00.

Respectfully submitted,

_____
B. Scott West

NOTICE

The Commonwealth will take notice that the above referenced motion will be heard on May 9, 1999, at 10:00 p.m. or as soon thereafter as the Court allows.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was hand-delivered to the office of County Attorney, _____, KY on May 8, 1999.

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COMMONWEALTH OF KENTUCKY
_____DISTRICT COURT
CASE NO. 01-M-157

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. **MOTION FOR CHANGE OF CONDITIONS OF RELEASE**

_____ DEFENDANT

Defendant, by counsel, hereby moves this Court, pursuant to RCr 4.10, 4.16(1) and 4.40(1); KRS 431.525(1); and Sections 16 and 17 of the Kentucky Constitution to grant a change of conditions of release by reducing his present $10,000 cash only bond to a more reasonable and appropriate condition of release consistent with the defendant's limited financial means. As grounds for this motion defendant states:

1. Mr. Jones was arrested on April 18 by Capt. Avery of the Local Police Department for violation of a Emergency Protective Order (EPO). The uniform citation states that he was at a trailer on Smith Ave. and that that trailer was about 300 feet from where petitioner of the EPO, Mr. Jones' wife, is presently staying. It further alleges that Mr. Jones and his wife were having words. The undersigned personally contacted Capt. Avery in regards to the above situation and pursuant to that conversation determined that no physical altercation occurred but that an argument was ensuing and in his opinion Mr. Jones was less than 500 feet away from the EPO petitioner and thus solved the argument by arresting Mr. Jones for violation of an EPO. He is unaware of who may or may not have initiated any contact or verbal disagreements but was aware that calls had been made to the police on behalf of both parties.

2. Upon information and belief, Mr. Jones was arraigned in this County on Monday, April 20 and at that time appointed the undersigned as counsel. Counsel for Mr. Jones received notice of this appointment through the County Clerk's Office. Undersigned has spoken to Mr. Jones who was under the belief that staying at part time at a trailer on Smith Ave. with a friend did not constitute a violation of the EPO and that he believed that it was 500 feet away. Further, Mr. Jones denies the allegations contained in the EPO filed in this case.

3. Because of the severity of Mr. Jones present conditions of release and his extremely limited financial resources, he has been unable to make bond in this case.

4. A hearing was originally set in this case for May 24 but notice was received by the undersigned from the Clerk's Office that the court date has been moved to June 1. This additional week without a meaningful appearance before the Court seriously jeopardizes Mr. Jones' rights in this matter and serve as an undue hardship on him. Counsel for Mr. Jones request that this Court take judicial notice of his young age, the young age of his wife and other circumstances surrounding this situation known by the Court through its prior contact with Mr. Jones.

5. A defendant must be released on personal recognizance or upon an unsecured bail bond unless this Court "determines in the exercise of its discretion, that such release would not reasonably assure (his) appearance." RCr 4.10; KRS 431.420.

6. This Court is required to impose the least onerous condition reasonably likely to ensure the defendant's appearance. RCr 4.12.

7. When all of the relevant factors of this case are considered, circumstances demand the imposition of a personal recognizance bond or at least a more reasonable type of bond which the defendant could post. It is significant that Mr. Chaney has never missed a court appearance in his one brush with the law and the prior civil domestic issue that arose from Mr. Jones' in-laws.

8. His mother has appeared with him in court on previous days. She, although of modest financial means, is employed as well as the guardian of his SSI check but does not have the assets to meet the presently set bond.

9. The undersigned has spoken with the acting County Attorney and she indicated that she had no objection to a modification of the bond in this case.

WHEREFORE, defendant prays that this Court grants this motion and modify Mr. Jones' conditions of release by reducing his present $10,000 cash only bond to a third party unsecured bond, or a more reasonable and appropriate method of pretrial release under such conditions that this Court deems necessary.

Respectfully submitted,

_____
Rebecca Lytle

COMMONWEALTH OF KENTUCKY
_____ DISTRICT COURT
CASE NO. 01-M-157

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. **MOTION FOR BOND HEARING**

_____ DEFENDANT

Defendant, by counsel, hereby moves this Court, pursuant to RCr 4.10, 4.16(1) and 4.40(1); KRS 431.525(1); and Sections 16 and 17 of the Kentucky Constitution to grant a hearing regarding his right to reasonable bond and alleged violations of bond. As grounds for this motion defendant states as follows:

1. Mr. Jones was arrested on April 18, 1998 and this court granted a change in conditions of release and Mr. Jones was released on April 23rd.

2. Upon information and belief, Mr. Jones was re-arrested for violating the EPO on April 25 because of allegations made by his wife that he went to her house and banged on the door. Undersigned has spoken to Mr. Jones concerning this new allegation and he denies any violation and has provided a detailed account of his movement during the time he left jail to the time he was re-arrested. There are several individuals who had contact with the defendant during that time. However, a hearing is requested so that evidence may be presented as to the time of the new alleged violation so that witnesses may appear to confirm Mr. Jones whereabouts during the times in question. First, it must be determined when this new violation allegedly occurred.

3. Because of the new allegations, Mr. Jones has been unable to make bond in this case and has a right to a bond hearing regarding this matter.

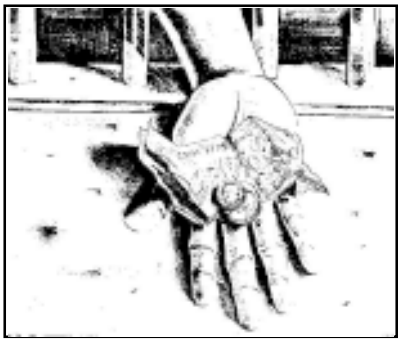
WHEREFORE, defendant prays that this Court grant this motion and set this matter for a hearing at the earliest possible date.

Respectfully submitted,

_____

Rebecca Lytle ■

Bail on Appeal



Bail on appeal may not be the norm but there are more appellants that should be afforded bail on appeal than are currently receiving such release.

In *Chambers v. Mississippi*, 405 U.S. 1205 (1972) and 410 U.S. 284 (1973) the defendant was found guilty of murdering a black police officer, and he was sentenced to life, had no priors, was a deacon in his church. Mr. Chambers was married with nine children and had resided in his community all his life. Prior to trial, he was on bond for 14 months. Pending a decision on his petition for certiorari, Justice Powell fixed his bail at $15,000. The Attorney General asked for reconsideration since Mr. Chambers was a danger to the community attaching affidavits of the sheriff, police chief and police commissioner. Justice Powell declined to change his decision stating, "on this record, I am unable to conclude that petitioner's mere presence in the community poses such a threat to the public 'that the only way to protect against it would be to keep (him) in jail.'" *Id*. 405 S.Ct. at 1206.

The court in *Hutzler v. Dostert*, 236 S.E.2d 336 (W.Va. 1977) used this decision by Justice Powell to find that the $25,000 appeal bond for a defendant convicted of a misdemeanor of assault and battery to be excessive and an abuse of discretion.

Upon conviction, there is no constitutional right to an appeal bond. *Braden v. Lady*, Ky., 276 S.W.2d 664, 666 (1955) However, "bail may be allowed by the trial judge pending appeal notwithstanding that service of the sentence has commenced, except when the defendant has been sentenced to death or life imprisonment." RCr 12.78.

The standard of review by the appellate court for reversing a trial court's refusal to grant bail on appeal is that the trial judge "failed to exercise sound discretion." RCr 12.82.

RCr 12.78(3) makes clear that the "applicable provisions gov-

Continued on page 18

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erning bail [RCr 4.00 - 4.58] shall apply to bail on appeal."

The trial court shall conduct an adversary hearing when asked to set an appeal bond. *Commonwealth v. Peacock*, Ky., 701 S.W.2d 397, 398 (1985).

If a trial judge denies an appeal bond, written reasons pursuant to RCr 4.16 shall be entered. *Peacock, supra*, at 398. In *Lane v. Nevada*, 652 P.2d 1174 (Nev. 1982) the Court remanded an appeal of a denial of bond to require the trial court to set out "the court's legal reasons for denying bail and the factors in support thereof including references to relevant portions of the record." *Id*. The reasons for requiring this explanation was to allow the appellate court "to resolve a subsequent motion for bail pending appeal. In such a case we do not conduct a separate fact-finding proceeding, but '…make our independent judgment on a review of the reasons relied upon by the lower court.'" *Id*.

Upon remand, the trial court set out as its reason for denying bail was that the appeal was frivolous. The appellate court found that sole reason inadequate, and again remanded telling the trial judge it had to make a finding on whether the appellant's release posed "a risk of flight or danger to the community." *Id*. *Lane* also cautioned the trial judge on considering in its determination that the appeal was meritless. "Although a district court may make a determination that an appeal is frivolous in ruling on a motion for bail pending appeal…, it should exercise due caution when denying bail solely on this ground. The determination of frivolousness approaches the province of appellate review, and is ultimately a question for decision by this court." *Id*. at 1175 n.1.

In *State v. Blum*, 566 A.2d 1131 (N.H. 1989) the appellate court confronted the meaning of a statutory provision controlling bail on appeal which allowed the trial judge to grant bail pending appeal only if the defendant showed by a preponderance of the evidence that "the appeal is not frivolous or taken for delay." The trial judge interpreted the term frivolous to mean the appeal "did not have a serous likelihood of prevailing." *Id*. at 1134.

The appellate court saw it differently. "It is unrealistic to place the trial court in the position of determining whether a defendant's appeal has a serious likelihood of prevailing. It is doubtful that any trial court would rule that its conduct, in the first instance, was sufficiently suspect to warrant a finding that there is a serious likelihood of reversal. We hold that an appeal is not frivolous where there exist reasonable grounds to argue that the record contains assignable error, the type of which may result in reversal." *Id*. at 1134.

In Kentucky, if application for bail on appeal "to the trial court is not practicable or that application has been made and denied with reasons given for the denial, or that application did not afford the relief to which the applicant considers himself or herself to be entitled," a request for bond on appeal can be made to the appellate court. RCr 12.82.

The appellate court must limit its decision to material found in the record and may not contact or attempt to contact the probation or parole officer or the prosecutor. *Commonwealth v. Peacock*, Ky., 701 S.W.2d 397, 398 (1985).

The Kentucky Rules of Criminal Procedure have long recognized the need for expedited appeals of pretrial bail rulings to prevent hardships. RCr 4.43.

Justice is not served when a person who prevails on an appeal of a district court conviction or a felony conviction with a short sentence has served most or all of his sentence when he receives his reversal. Bail on appeal, which is clearly in the discretion of the trial judge and appellate court, can provide appropriate relief from this injustice if timely decided.

A change in RCr 12.78 that would provide short but reasonable timelines for the decisions on whether bail on appeal will be granted in appeals of district court convictions to the circuit court and short felony convictions appealed to the Court of Appeals would advance the interests of fairness. Such a change could provide clear direction on the factors to consider in making the discretionary decision.

While there is no constitutional right to bail while the appeal is pending before the appellate court, *Braden v. Lady*, Ky., 276 S.W.2d 664, 666 (1955), a successful appeal for someone who has substantially or completely served his sentence creates relief that has limited meaning.

An amendment of RCr 12.78 would encourage timely decisions about whether to provide an appellant with bail on appeal when his sentence is not long to be made in a fair, reliable way. Such an amendment could be:

If a notice of appeal is filed in a case involving a conviction and sentence, which will be substantially or completely served pending resolution of the appeal, a trial judge shall consider a request for bail pending the appeal within ten days of its request. If the trial judge denies the request for bail pending appeal, the circuit judge or Court of Appeals, whichever applies, shall decide any appeal of the denial of bail, brought pursuant to RCr 12.82 within ten days of its request. In deciding the request for bail pending the appeal of the conviction and sentence, the judge or Court of Appeals shall give due consideration of the length of time it will take to decide the appeal and the considerations of RCr 4.16

Sample motions for bond pending appeal follow.

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_____ CIRCUIT COURT
INDICTMENT NO. _____

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **MOTION TO SET REASONABLE BAIL WITHIN THE FINANCIAL LIMITATIONS OF THE DEFENDANT PENDING APPEAL**

_____ DEFENDANT

The Defendant, by counsel, requests this Court, pursuant to RCr 12.78, RCr 4.16, and Sections 2, 16 and 17 of the Kentucky Constitution, to set bail pending defendant's appeal to the Kentucky Court of Appeals. The grounds for this request include:

1. Defendant was sentenced to five years imprisonment for receiving stolen property on _____.

2. Defendant filed his timely Notice of Appeal from the Final Judgment on _____.

3. Defendant's Brief is presently due to be filed in the Kentucky Court of Appeals on _____.

4. This appeal is presently handled by the Department of Public Advocacy, Frankfort, Kentucky.

5. There was serious, irreparable error at the trial which were preserved for review on the merits. The preserved errors include: _____.

6. While the defendant is not entitled as a matter of right to bail pending appeal, *Braden v. Lady*, Ky., 276 S.W.2d 664, 666 (1955), this Court does have the discretion, pursuant to RCr 12.78, to grant the defendant bail pending appeal. *Commonwealth v. Peacock*, Ky., 701 S.W.2d 397, 398 (1985).

7. Section 16 of the Kentucky Constitution states, "All prisoners shall be bailable by sufficient securities…."

8. Section 17 of the Kentucky Constitution states, "Excessive bail shall not be required…."

9. Attached is an affidavit of defendant, which states grounds for his appeal bond request.

10. If defendant were released on bail pending appeal, the likelihood of his flight would be minimal and the potential danger he might impose on the community is minimal. Accordingly, "he should be considered as having presented at least a prima facie case for release pending appeal." *In Re Podesto*, 544 P.2d 1297, 1305 (Cal. 1976).

WHEREFORE, defendant requests this Court to set reasonable bail pending his appeal in accordance with RCr 4.16, applicable under RCr 12.78(3) to bail pending appeal, which is within his limited financial ability.

AFFIDAVIT OF APPELLANT

I, Defendant, state:

1. That during the last three winters I have been employed at the _____ in _____;
2. That I have five children all presently in school, in grades one through eight;
3. That my wife is presently employed, but she cannot receive state aid for the children;
4. That I and my wife are presently renting an apartment;
5. That if bond is granted, I will live with my wife and children and seek employment to support my family;
6. I have never missed any court appearance date;
7. That I have lived in this community all my life;
8. I am fully aware that if I were to violate this proposed bond that I would be subject to another felony charge;
9. I have no intention of violating the proposed bond.

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COMMONWEALTH OF KENTUCKY
CASEY CIRCUIT COURT
INDICTMENT NO. 00- CR - 00059

COMMONWEALTH OF KENTUCKY PLAINTIFF

MOTION FOR COURT TO SET BOND PENDING APPEAL

v.

_____ DEFENDANT

Comes now the defendant, by counsel, and moves the Court under RCr 12.82 and Sections 16 and 17 of the Kentucky Constitution to set an appeal bond in this case. In support of this motion, the defendant states:

1. This Court is requested to set reasonable bond in the amount of _____, pending appeal to the Kentucky Supreme Court in this case.

2. The Defendant was convicted of first degree burglary and theft by unlawful taking. He was sentenced to 20 years for the burglary charge and 5 years on the theft charge to run concurrently, for a total of 20 years to serve. The Defendant has appealed his conviction and sentence to the Supreme Court of Kentucky.

3. "The right to bail is an important part of our criminal procedure." *Carbo v. United States*, 82 S.Ct. 662 (Douglas, J. acting as circuit justice, 1962). "Bail normally should be granted pending review where the appeal is not 'frivolous' nor 'taken for delay." *Carbo* at 666. "Detention pending the [appeal] is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief." *McKnight v. United States*, 113 F. 451, 453 (1902) "Bail pending appeal should never be denied for the purpose of punishment." *Reynolds v. United States*, 80 S. Ct. 30, 32 (Douglas, acting as Circuit Justice, 1959). While there is no automatic right to bail after convictions, (*Bowman v. United States*, 85 S.Ct. 232 (1964)), the 8th Amendment to the United States Constitution requires that bail should be denied only for the strongest of reasons. *Harris v. United States*, 92 S.Ct. 10, 12 (Douglas, acting as Circuit Justice, 1971).

4. Section 16 of the Kentucky Constitution guarantees the right to bail for all prisoners except, in very limited circumstances, those charged with capital offenses. While it has been held that Section 16 does not confer a constitutional right to bail pending appeal, it has been recognized that a trial court may not act arbitrarily or capriciously in denying bail or setting an unreasonably high bond. *Braden v. Lady*, Ky., 276 S.W.2d 664, 666 (1955).

5. Defendant is willing to submit to any non-financial conditions this Court would want to place on him if he should receive bail.

6. Among the reasons why the Court should set such bond pending appeal in this case are:

_____
_____
_____
_____

WHEREFORE, it is requested that this Court

1. set bond for bail pending appeal in an amount not to exceed _____, and

2. grant all such other relief as to which he may appear entitled.

On this the _____ day of _____, 2001 .

Respectfully submitted,

Misty Dugger

SUPREME COURT OF KENTUCKY
FILE NO. 00-SC-000053

_____ APPELLANT

VS. **MOTION FOR BAIL PENDING APPEAL**

COMMONWEALTH OF KENTUCKY APPELLEE

Comes now the defendant, _____, by and through counsel, and respectfully requests this court pursuant to RCr. 12.82 and Sections 16 and 17 of the Kentucky Constitution to allow a reasonable bail pending the appeal of this case. In support of this motion, appellant states as follows:

1. _____ was convicted of wanton murder and criminal facilitation to manufacture methamphetamine. He was sentenced to 25 years for the murder charge and 5 years on the drug charge. The 5 year sentence was enhanced to 10 via the persistent felony offender status. The 25 year sentence and the 10 year sentence were ordered to run consecutively.

2. Mr. _____ has appealed his conviction and sentence to this Court. A motion for bond pending appeal was made at the trial court level. However, the trial court order stated the entire record had been certified to this Court, leaving the trial court with nothing to consider in setting bail [copy attached]. Consequently, the trial court denied Mr. _____'s motion for bond pending appeal. Therefore, this motion is properly before this Court.

3. "The right to bail is an important part of our criminal procedure." *Carbo v. United States*, 82 S.Ct. 662 (Douglas, J. acting as circuit justice, 1962). "Bail normally should be granted pending review where the appeal is not 'frivolous' nor 'taken for delay." *Carbo* at 666. "Detention pending the [appeal] is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief." *McKnight v. United States*, 113 F. 451, 453 (1902) "Bail pending appeal should never be denied for the purpose of punishment." *Reynolds v. United States*, 80 S. Ct. 30, 32 (Douglas, acting as Circuit Justice, 1959). While there is no automatic right to bail after convictions, (*Bowman v. United States*, 85 S.Ct. 232 (1964)), the 8th Amendment to the United States Constitution requires that bail should be denied only for the strongest of reasons. *Harris v. United States*, 92 S.Ct. 10, 12 (Douglas, acting as Circuit Justice, 1971).

4. Section 16 of the Kentucky Constitution guarantees the right to bail for all prisoners except, in very limited circumstances, those charged with capital offenses. While it has been held that Section 16 does not confer a constitutional right to bail pending appeal, it has been recognized that a trial court may not act arbitrarily or capriciously in denying bail or setting an unreasonably high bond. *Braden v. Lady*, Ky., 276 S.W.2d 664, 666 (1955).

5. As detailed in Mr. Landrum's Verified Motion For Court to Set Bond Pending Appeal, attached hereto and incorporated herein by reference, he has a job available to him should this motion be granted, and he will be living with his mother and father, in order that he may provide for his infant child.

6. Appellant is willing to submit to any non-financial conditions this court would want to place on him if he should receive bail.

WHEREFORE, appellant respectfully requests that this Court allow him a reasonable bail pending his appeal as requested in Verified Motion For Court To Set Bond Pending Appeal.

Respectfully submitted,

Shannon Dupree ■

Reliably Determining Probable Cause for the Citizen-Accused Who is Presumed Innocent

Rebecca DiLoreto

Some months back, criminal defense litigators participated in a vigorous discussion on the DPA criminal defense list serve about the value of preliminary hearings. This discussion probed the very purpose of the hearing: to prove to the district court that the Commonwealth lacks probable cause to proceed with a felony, to secure release of your client within the sixty days from arraignment if no hearing is held, to insure against erroneous or improper prosecution. The suggestions demonstrated that competent defense attorneys test the state's assertion of probable cause by challenging the evidence in context. The authority of the state to incarcerate an accused citizen lacks integrity when the process affords only a superficial presentation and testing of the evidence.

There is constant pressure on the indigent defense lawyer to assist the court in moving cases efficiently through the docket. Perhaps that pressure is felt nowhere more strongly than in district court. A public defender can face up to ten cases set for preliminary hearing in an afternoon. Everyone in the courtroom knows that if every case is heard, no one will be home in time for supper. Is there a value to preliminary hearings? If there is one, what is that value and when do other considerations appropriately impact the determination of counsel to proceed with the hearing.

Borrowing from the DPA list serve discussion, this article will explore the tangible and more ephemeral values experienced criminal defense lawyers have uncovered in mining the rich value of our client's right to a preliminary hearing when facing felony charges in district court.

The Kentucky Supreme Court recognizes the importance of this proceeding as it has provided in RCr 3.14(2) the right of the defense to cross-examine the state's witnesses and call its own witnesses.

The U.S. Supreme Court has likewise recognized the critical nature of the preliminary hearing In addressing whether a person was entitled to counsel at the preliminary hearing, *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) identified tasks of counsel at the hearing to insure against an "erroneous or improper prosecution": "the lawyer's skilled examination and cross-examination of witnesses may [first] expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Id*. at 2003.

A good source for identifying the values of holding a preliminary hearing can be found at the DPA website resource on preliminary hearings contained within its new attorney education material. "Preliminary Hearings," *The Advocate* Vol. 18 No.5 at 47, by John Niland and George Sornberger also presents a complete perspective on the subject. These cites recognize the following benefits to holding (not waiving) a preliminary hearing:

- The Presentation of Evidence

  The preliminary hearing gives the lawyer a forum wherein testimony can be preserved, motions can be made to preserve forensic evidence and witness statements, to view and preserve crime scenes, to take and preserve photographs. Motions can be made to prohibit witness tampering or prohibit other efforts to pollute the truth.

- Authentic Testing of the Commonwealth's Case in Context

  By cross-examining the state's witnesses and calling defense witnesses as permitted by RCr 3.14(2), counsel can provide the judge with the freshest possible evidence before time warps perspectives or tampering and influencing of testimony alters statements. By asking open-ended questions and soliciting hearsay, counsel can uncover information that would not otherwise be exposed in a trial before a jury but that may lead the judge to determine there is no probable cause and may be helpful to the development of a defense at trial.

- Providing Concrete Information on Biases of Commonwealth's Witnesses

  Generally, the state limits its witnesses. Yet even those called by the state can provide statements that later serve the defense at trial as sources rich for impeachment. Additionally, the defense may subpoena other witnesses whom it expects to see on the Commonwealth's list at trial. Again, critical statements and perspectives can be provided the judge so the probable cause determinations made with both sides of the story preserved.

- Discovering Evidence that Shows Innocence

  Material evidence uncovered during a preliminary hearing may show the judge that not only is there no probable cause but the client is innocent, such evidence can also prove quite useful to a Grand Jury during its deliberation. Counsel may believe it futile to use such evidence to convince a district court judge not to find probable cause, but grand jurors can be moved to consider evidence in mitigation or evidence of innocence. The production of such evidence during a preliminary hearing can later be turned into a motion for the grand jury to consider defense proffered evidence and witnesses and insure reliable decision-making.

- Persuading the Client and Her/His Family That Counsel Stands for the Client

  So many cases are lost because of poor relations with clients who do not understand that you are an advocate and who do not understand the seriousness of what they face. A vigorous defense out of the gates speaks volumes to our clients. One experienced lawyer described how the client's entire family came up and apologized for having been rude to her after witnessing the vigor with which she presented her client's case at the preliminary hearing. This allows for efficient representation. It also allows clients to better receive advice on whether or not to plead.

- Persuading the Court and Prosecutor That This Case Should Be Pled to a Lesser

  Evidence moves those in the courtroom. Both sides of the story provide much assistance to the judge. A judge who only has one side of the story is in a different position to make decisions. Perhaps this felony assault is not all it was cracked up to be. Prosecutors can also be persuaded. On one occasion, a commonwealth detective sat through the preliminary hearing and at its conclusion, though the district judge waived the case, the detective advised counsel that she would see to it that a lesser offense indictment was secured. Everyone is too busy, to waste time needlessly. Your evidence and the strength with which you combat the state's evidence may cause the opposing side or the court to see a fairer solution than indictment.

- Making a Record By Trying to Put on Evidence and Being Thwarted With an Objection by the Commonwealth

  Here is a potential excerpt from your next closing argument to the jury, recommended by Sornberger and Niland to be used **after** you employ a vigorous practice at the preliminary hearing: "You know, men and women of the jury, you are the very first people to hear our evidence with any power to do something with it. We tried to present this evidence to the District Judge at a Preliminary Hearing, **but the Commonwealth objected**. The prosecutor can't keep the truth away from you any longer, and now finally, our side has been heard and justice will prevail."

- Providing Physical Evidence Early

  The judge is entitled to more than half the story, especially if that half is misleading. You are entitled to subpoena not only people but documents to the preliminary hearing. Armed with a *subpoena* you can now compel testimony and require the production of records. As far in advance of the hearing as possible issue *subpoena duces tecum* for the records you want to see such as insurance company reports, phone records, ER and other medical records, photographs and test results. Defense attorneys are often accused of delaying things. Getting the evidence relevant to the probable cause determination timely is important for the judge to make a decision the public can confidently rely upon.

- Educating The Client or His/Her Family About the Case

  A preliminary hearing gives the client a chance to view the evidence, to eyeball the state's chief witness, to weigh the risks. Such an assessment may be important in later discussions with the client and family members as the lawyer helps the client weigh options. It is in the interest of the efficiency of the court process. If a client comes to an awareness in the middle of trial, that he would have been better off pleading the "deal" available before trial may no longer be on the table.

- Bond Review Motions

  The preliminary hearing gives you occasion to insure a fairer bond. Evidence presented at the hearing may cause the court to reconsider the high bond and set something more reasonable.

Given all of these benefits and the additional ones that come to the reader's mind, why then is it that an advocate would consider waiver? To begin this shift in discussion, the rule itself leads one in that direction. Rule of Criminal Procedure 3.10 is entitled *Preliminary Hearing-Waiver*. Subsection (1) states that "[t]he defendant may waive a preliminary hearing." Like the Song of the Siren, it calls us to give up a client's right! The Kentucky Supreme Court has held that the preliminary hearing was not such an important part of the prosecution as to render its denial a violation of a constitutional right when a petitioner has already pled guilty to an indictment. *See Commonwealth v. Watkins*, Ky., 398 S.W.2d 698, cert. denied, 384 U.S. 965 (1996). There are prosecutors who hinge open file discovery upon the waiver of a preliminary hearing. There are others who leverage release on bond. At times, defense lawyers have waived the hearing out of concern that co-defendants already out on bond may attend the preliminary hearing and uncover critical evidence to aid in the prosecution of their clients. In rare circumstances, witnesses available at the preliminary hearing may never be available again for examination. Perhaps their testimony helps your client's case, but when such testimony is damaging, preserving it by direct or cross-examination at a preliminary hearing is redundantly not helpful. There could be a mistake in the charging

Continued on page 24

Continued from page 23

document that you hope the Commonwealth will miss all the way through the prosecution to circuit court. In such circumstances, a preliminary hearing could underscore the mistake and remedy it to your client's detriment. Preliminary hearings can mean publicity for a high profile case that you believe you can negotiate to a better resolution by avoiding the hearing.

Yet, the prevailing attitude from those who practice in the daily grind of district court and who know the consequences of waiver is to exercise great hesitancy in waiving this important right for the client. The client's perspective is usually focused on the short term. You are the counselor to offer the long range perspective. You know the value to the hearing well beyond what most of our clients can appreciate. The list serve discussion left one final resounding note. As experienced attorneys we often think we have all of the answers before we have even begun to ask the critical questions. One attitude motivating waiver is a prevailing belief that "you won't find out anything anyway." District court work can become routine, just as any other type of litigation done day after day. Yet, the experience of lawyers who have done this work for twenty years is that no lawyer knows enough about a felony case at the district level to make such a call. Though RCr 3.10 could almost be said to presume waiver, waiver should be an exception to the rule, and an exception taken only for reasons of substantial benefit to the client's case. Experience indicates that to protect our clients' rights sometimes supper must grow cold and the wheels of justice must roll a bit more slowly. ■

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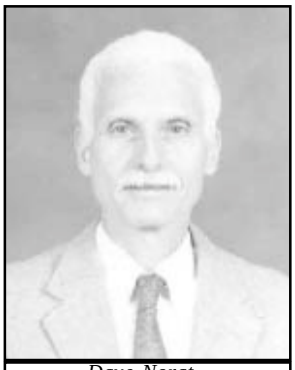
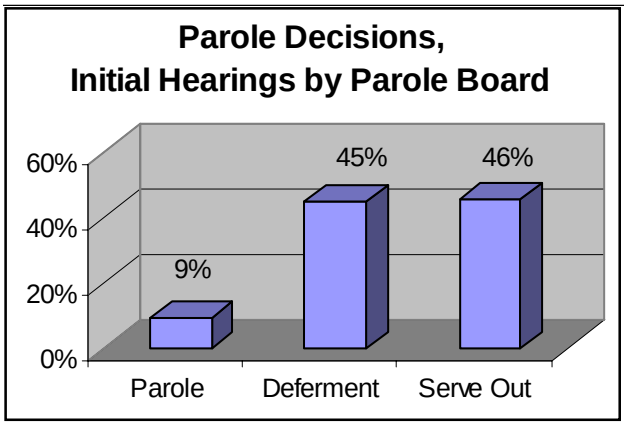
Parole is Evaporating: An Update



Dave Norat

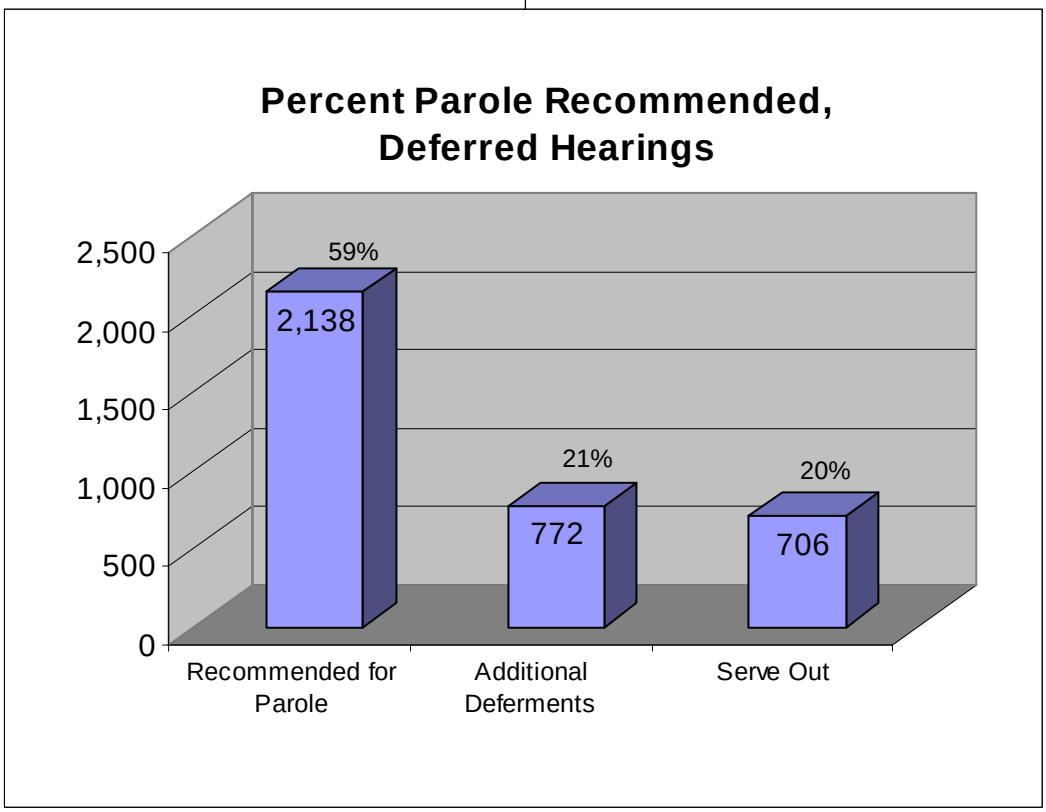
Clients, victims, and members of the community are still asking, "How much time really will be served?" Or, "Oh!, He got a five year sentence so he will out in a year." Or, "Everybody makes parole the first time they see the parole board." What do the facts show?

Only 9% paroled on initial hearing. According to the *Kentucky Parole Board* statistics compiled by the Department of Corrections for Fiscal Year 00 (July 1, 1999 - June 30, 2000), only 9% or 398 individuals were recommended for parole out of the 4,554 cases that received initial hearings/reviews in fiscal year 00. Of the remaining 91%, 45% or 2,033 were deferred and 47% or 2,123 were ordered to serve out their sentences. While the Report does not tell us what the average length of deferment or the average length of time for serve out of sentence, the report does tell us that: a five-year sentence does not mean the individual will be out in a year; an individual has only a 1 in 10 chance of making parole upon initial review; and, you have about an equal chance of being served out on your sentence as you have of being paroled before serving out.



Deferrals have a better chance of parole. The Parole Board's statistics show that if an offender was given a deferral(s), the offender will have a better chance of being paroled coming off the deferral. A deferral is when the offender is told he will have to serve an additional number of months beyond initial parole eligibility before the Parole Board will see him again to review his case for possible parole. This is also known as a "flop" in the prisons. An offender may receive more than one deferral before being paroled.

The Parole Board interviewed or reviewed 3,616 deferred cases in FY 00. For the cases that came up for parole 2,138 were recommended for parole, with 772 receiving another deferral and 706 ordered to serve out. Offenders coming before the Parole Board after receiving a deferral had a 6 in 10 chance of making parole. The current statistics do not say how many deferrals or give an average number of deferrals before the parole being granted.



The Parole Board conducted 8,170 parole interviews in FY 00. In FY 00 the Parole Board saw 8,170 offenders for either an initial appearance or deferred interview/review. The combined FY 00 parole and serve out percentages indicates that 15 years ago the answer to the question, "How much time really will be served?" would still be quite different than the answer last year or today. For the last two or even five fiscal years there has been no significant difference, except for FY 1997-98, in the percentage of offenders who make parole, are deferred or given a serve out.

Comparison Data for FY 84, FY 93 thru FY 00, All Hearings (Initial &Deferred)

	1983-1984	1992-1993	1993--1994	1994-1995	1995-1996	1996-1997	1997-1998	1998-1999	*1999-2000
Parole	55%	39%	39%	36%	33%	30%	26%	31%	31%
Deferment	37%	37%	34%	32%	33%	37%	41%	35%	34%
Serve Out	8%	24%	27%	32%	34%	33%	33%	34%	35%

* 146 residents not seen due to sex offender status

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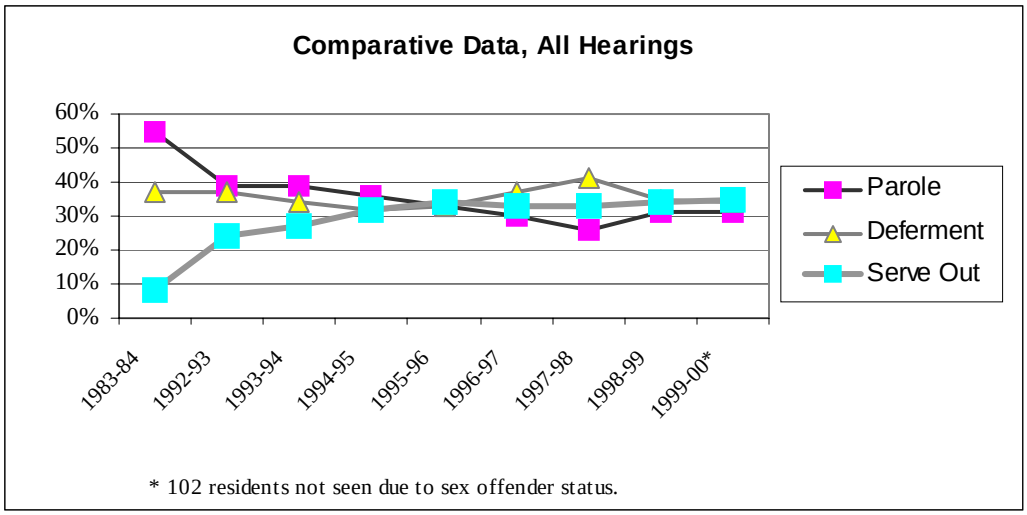
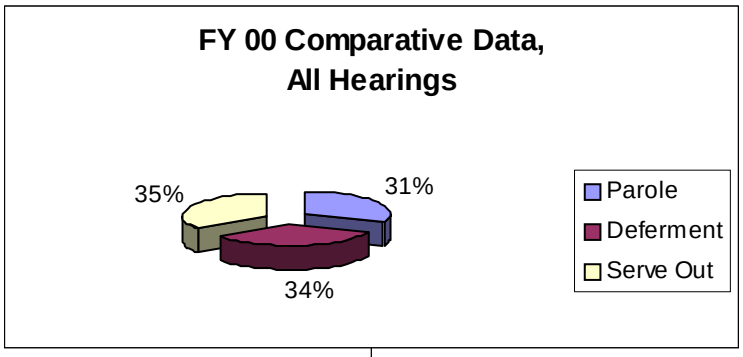


For FY 00, 35% of all hearings (initial and deferred) resulted in a serve out, 34% in a deferment, and 31% in parole. This compares to the FY84 figures of 55% paroled, 37% deferred, and 8% serving out.

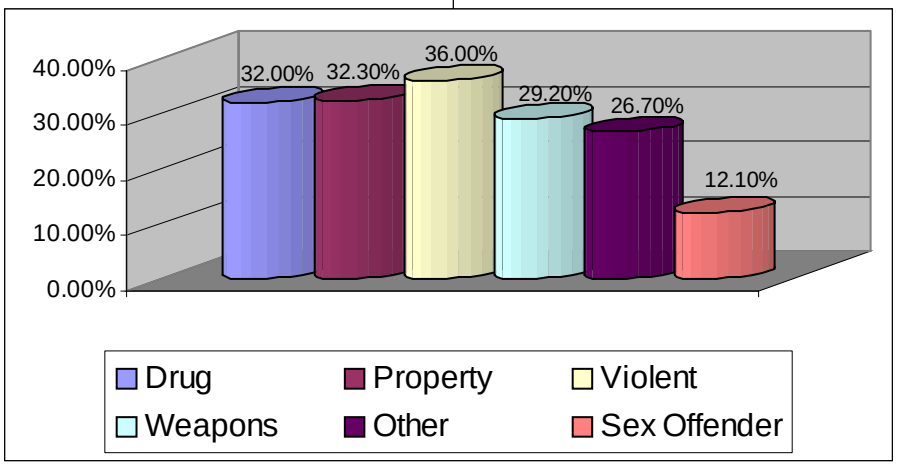


Only one (1) offender serving a life sentence was paroled in FY 00. In FY 00, 12 offenders serving a life sentence saw the Parole Board. Of those 12, 11 were deferred and 1 was recommended for parole. No offenders received a serve out.

Completion of Sex Offender Treatment Program required before Parole Board review [(KRS 439.340 (1)]. The Department of Corrections also reported there were 146 inmates with sex offenses who were eligible based on time served, but were not seen by the Parole Board due to failure to complete required sex offender treatment programs.

Incarceration of sex offenders. Kentucky's incarceration of sex offenders has been leveling off. In the four-year period (1998-2001) there has been a net increase of 51 persons in corrections with a sex offense, compared to 226 persons in prison for sex offenses between January 1995 and January 1999. As of January 2001, 1,673 inmates are being imprisoned for sex convictions.

Recidivism of sex offenders lower than other inmates. In 1998 the recidivism rate in Kentucky for all offenders was 31.6%, for sex offenders it was 12.1%



Parole of sex offenders low. According to statistics by the Kentucky Corrections Cabinet June 20, 2001, the percentage of paroled sex offenders has not changed since 1999. It stands at a low 7%.

Kentucky Department of Corrections Sex Offenders
Number of Inmates by Type of Exit Median Sentence for New Commitments

FYE	Parole	Serve Out	Pre-release Probated	Other: Court Order/Death	Median Sentence for New Commitments (years)
1991	44 (23%)	135	14	--	10
1992	41	146	20	--	10
1993	51	203	30	--	8
1994	98 (41%)	199	42	--	8
1995	67	247	18	--	7
1996	68	243	27	--	8
1997	68	297	23	--	6
1998	39	295	24	--	7
1999	25 (7%)	295	27	--	6
2000	30 (7%)	314	25	34	5

Criteria for Parole. While the available statistics do not provide information as to what type of individual is granted parole upon initial review, we do know what factors the parole board applies in its decisions to grant or deny parole at any stage of an individual's eligibility. These criteria are found in Section 4 of 501 Kentucky Administrative Regulations, Chapter 1:030. The factors are:

(a) Current offense - seriousness, violence involved, firearm use;
(b) Prior record;
(c) Institutional adjustment and conduct - disciplinary reports, loss of good time, work and program involvement;
(d) Attitude toward authority - before incarceration, during incarceration;
(e) History of alcohol or drug involvement;
(f) History of prior probation, shock probation, or parole violations;
(g) Education and job skills;
(h) Employment history;
(i) Emotional stability;
(j) Mental capacities;
(k) Terminal illness;
(l) History of deviant behavior;
(m) Official and community attitudes toward accepting inmate back in the county of conviction;
(n) Victim impact statements and victim impact hearings;
(o) Review of parole plan - housing, employment, need for community treatment and follow-up resources;
(p) Any other factors involved that would relate to the inmate's needs and the safety of the public.

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So, parole eligibility: What does it really mean?

In FY 00 an offender had 1 chance in 10 of making parole the first time they saw the parole board. In FY 00 an offender had 6 chances in 10 of making parole after having received one or more deferments from the Parole Board. Over the last 16 years, parole upon initial review decreased by 24% and that the likelihood of getting a serve out has increased by 26%. Important numbers when talking to clients, jurors, judges, victims, or community members. ■

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There has been a Steep Decline in Violent Juvenile Crime

Nationally, the FBI has reported that for the eighth straight year serious crimes fell for juveniles and adults in 1999, with the national Crime Index total 20% lower than in 1990. The U.S. Department of Justice reports that violent crime rates for adults and juveniles have declined since 1994, reaching the lowest level ever recorded in 2000. Violent crime rates among those under 18 fell 8% in 1999, with a 23% decrease since 1995. Violent crime arrests for those under 18 have decreased at a greater rate than violent crime arrests among other age groups during this time period. Under juvenile Violent Crime Index figures (which dropped 36% between 1994 and 1999), even if each arrest involved a different juvenile (*i.e.*, each juvenile arrested in 1999 was only arrested once), only about one-third of 1% of juveniles ages 10-17 were arrested for a violent crime in 1999. Overall arrests for those under 18 fell 8% in 1999. Arrests of those under 18 for murder and non-negligent manslaughter decreased 31% in 1999, with a 56% decrease since 1995. Between 1993 and 1999, the juvenile arrest rate for murder dropped 68%, reaching its lowest level in a generation.

Sources:
1) FBI - Uniform Crime Reports- "Crime in the United States -1999"
2) U.S. DOJ, Bureau of Justice Statistics - "Violent Crime Rates - 1973-2000"
3) OJJDP - various crime indices, charts, and arrest rate statistics from their web site.

Presumed Innocent

"Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), and is established beyond legislative contravention in the Due Process Clause. See *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692-1693, 48 L.Ed.2d 126 (1976); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-10-73, 25 L.Ed.2d 368 (1970). See also *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S.Ct. 1930, 1933-1934, 56 L.Ed.2d 468 (1978); *Kentucky v. Whorton*, 441 U.S. 786, 790, 99 S.Ct. 2088, 2090, 60 L.Ed.2d 640 (1979) (Stewart, J., dissenting)." *United States v. Salerno*, 481 U.S., 739, 763 (1987) (Marshall dissenting)

RACE TO INCARCERATE: A CHALLENGE TO THE CRIMINAL JUSTICE SYSTEM

Rare does a book come along that is so good, so true, so prophetic, that it is a must read. *Race to Incarcerate*, by Marc Mauer, (1999 by The Sentencing Project), is that kind of book. It is well written, well documented, packed with information and data, and absolutely damning of all of us who work in this criminal justice system. It is a book everyone involved in the Kentucky criminal justice system, prosecutors, defense attorneys, corrections officials, juvenile workers, pretrial release offices, should get and read.

His basic premise is well known: We are in the middle of an enormous shift in the number of people we incarcerate in this country. "[A] complex set of social and political developments have produced a wave of building and filling prisons virtually unprecedented in human history. Beginning with a prison population of just under 200,000 in 1972, the number of inmates in U.S. prisons has increased by nearly one million, rising to almost 1.2 million by 1997. Along with the more than one half million inmates in local jails either awaiting trial or serving short sentences, a remarkable total of 1.7 million Americans are now behind bars." (p. 9). It should be noted that a more recent assessment places the figure at above 2 million. This enormous growth has consequences for our society. "First among these is the virtual institutionalization of a societal commitment to the use of a massive prison system." *Id*. The second consequence is insidious: much of this growth in the use of incarceration has occurred in the African-American community. Mauer asks several poignant questions: "What does it mean to a community…to know that three out of ten boys growing up will spend time in prison? What does it do to the fabric of the family and community to have such a substantial proportion of its young men enmeshed in the criminal justice system? What images and values are communicated to young people who see the prisoner as the most prominent or pervasive role model in the community? What is the effect on a community's political influence when one quarter of the black men in some states cannot vote as a result of a felony conviction?"

Why did this happen to us? Mauer agrees that a rising crime rate, including the rising violent crime rate, contributed to this prison growth. However, Mauer also uses the data to state persuasively that there has also been a significant political component to this growth as well, namely, the "victory" of the "get-tough-on-crime" movement. Examples of such policy development were the decline in the number of indeterminate-sentencing states, the growth of mandatory minimums, the abolition of parole, "truth-in-sentencing," 85% service prior to release for violent offenses, etc. "[R]esearch has demonstrated that changes in criminal justice policy, rather than changes in crime rates, have been the most significant contributors leading to the rise in state prison populations. A regression analysis of the rise in the number of inmates from 1980 to 1996 concluded that one half (51.4 percent) of the increase was explained by a greater likelihood of a prison sentence upon arrest, one third (36.6 percent) by an increase in time served in prison, and just one ninth (11.5 percent) by higher offense rates." (p. 34)

Mauer notes that we now spend approximately $40 billion each year to incarcerate persons convicted of crimes. Is there another way to maintain community safety while saving our precious public resources for other priorities, such as education or health? According to Mauer, incarcerating "ever-increasing numbers of nonviolent property and drug offenders is hardly the only option available to policymakers, nor is it necessarily the most cost-effective. A study of the California prison population funded by the California legislature concluded that as many as a quarter of incoming inmates to the prison system would be appropriate candidates for diversion to community-based programs. This group would include offenders sentenced to prison for technical violations of parole, minor drug use, or nonviolent property offenses. The study estimated that diverting such offenders would save 17-20 percent of the corrections operating budget for new prison admissions. Other commentators have suggested that even higher rates of diversion are possible." (p. 37).

Proponents of the "race to incarcerate" would contend that the recent decline in the crime rate demonstrates that the $40 billion spent each year is well worth it in the increase in public safety. However, Mauer contends that the growth of incarceration has not necessarily led to a decline in the crime rate. "Overall crime rates generally rose in the 1970s, then declined from 1980 to 1984, increased again from 1984 to 1991, and then declined through 1995. With only minor exceptions, violent crime rates have followed this pattern as well. Each of these phases, of course, occurred during a time when the prison population was continuously rising. Thus, a steadily increasing prison population has twice coincided with periods of increase in crime and twice with declines in crime. The fact that the relationships are inconsistent does not mean that rising imprisonment had *no* impact on crime, but neither does it lend itself to a statement that incarceration had an unambiguously positive impact in this area." (p. 83-84).

One of the points Mauer makes most strongly is that the problem of crime is complex, that we delude ourselves if we

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believe that people commit or do not commit crimes due to the possibility of being imprisoned, and that in fact the problem of crime is bigger than the criminal justice system. "Our reliance on the criminal justice system as our primarily crime control mechanism has blinded us to the complexity of crime and ways to control it, and has thus encouraged heightened expectations about the role of courts and prisons in providing public safety. Since by definition these institutions are reactive systems that come into play *after* a crime has been committed, it should hardly be surprising that their role in controlling crime will always be limited. While most of us recognize intuitively that families, communities, and other institutions necessarily play a major role in the socialization process, political demagoguery has promoted the centrality of the criminal justice system as the means by which communities can be made safer."

The title of the book is a double entendre. Mauer uses the title to describe the enormous growth in the prison population over the past 30 years. However, the title is also representative of a significant effect of this "race," and that is on race relations and on the communities of color in this nation. "At the close of the twentieth century, race, crime, and the criminal justice system are inextricably linked." (p. 118).

Mauer speaks persuasively through statistics. "Half of all prison inmates are now African American, and another 17 percent are Hispanic…" (p. 118-119). "[A] black boy born in 1991 stood a 29 percent chance of being imprisoned at some point in his life, compared to a 16 percent chance for a Hispanic boy and a 4 percent chance for a white boy." (p. 125). "The degree to which arrest rates may explain the racial composition of the prison population has been examined by criminologist Alfred Blumstein…[who found] that, with the critical exception of drug offenses, higher rates of crime…were responsible for most of the high rate of black incarceration. In the 1991 study, for example, he found that 76 percent of the higher black rate of imprisonment was accounted for by higher rates of arrest. The remaining 24 percent of disparity might be explained by racial bias or other factors." (p. 127). "A report by the Federal Judicial Center found that in 1990 blacks were 21 percent more likely and Hispanics 28 percent more likely than whites to receive a mandatory prison term for offense behavior that fell under the mandatory sentencing legislation." (p. 138-139). Mauer goes on to demonstrate through data the racial disparities in the death penalty, sentencing, and the juvenile justice system.

Kentucky public defenders recently conducted a conference with the joint themes of eliminating racial discrimination and protecting the innocent. It was good that we as defenders focused for 3 days on the issue of race and how race is a pervasive factor in our criminal justice system. Other systems have likewise examined the issue of race; Chief Justice Lambert and former Chief Justice Stephens have been notable leaders in the quest for racial justice in the Kentucky criminal justice system. Governor Patton issued an Executive Order outlawing racial profiling. The Kentucky General Assembly recently passed the Racial Justice Act, the Racial Profiling Act, and the law to streamline the procedure for the restoration of civil rights for convicted felons. Kentucky is making much progress toward racial justice in our criminal justice system. Marc Mauer's book should assist us as we continue to struggle for racial justice in our criminal justice system, and should keep us from complacency. ■

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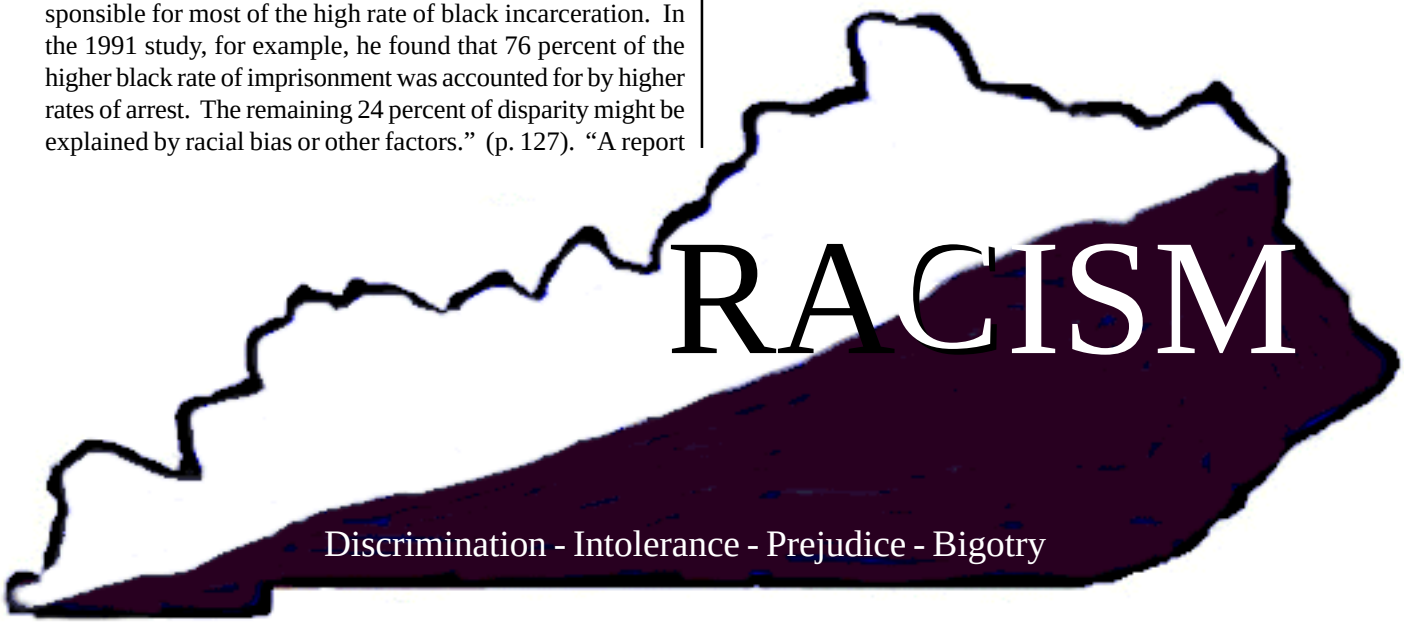

Kentucky's Statewide Defender Trial Representation Led by Experienced Regional Leaders

Each year, the Department of Public Advocacy trial division provides service to over 90,000 indigent individuals accused of crime and facing a hearing or a trial. The division is led by the Trial Division Director, **George Sornberger**. He has regional trial managers for the Capital Trial Branch and the Northern, Bluegrass, Eastern, Central, Western and Jefferson Regions.

The division consists of trial public defenders, investigators, mitigation specialists, clerks, paralegals, social workers and secretaries who support the representation efforts in the 26 full-time trial offices covering one or more counties.

Ernie Lewis, Public Advocate

The trial offices by region are headquartered in the following cities and led by the following regional manager with the indicated caseloads for FY 00 (July 1, 1999 – June 30, 2000) for each region:

Rob Riley, Northern: LaGrange, Covington, Frankfort, Maysville and Ashland; 12,169 cases;
Lynda Campbell, Bluegrass: Richmond, Somerset, Stanford, Stanton and Lexington; 14,360 cases;
Tom Glover, Western: Paducah, Hopkinsville, Madisonville, Henderson and Murray; 14,376 cases;
Roger Gibbs, Eastern: Paintsville, Morehead, Hazard, Pikeville, London and Pineville; 14,553 cases;
Rob Sexton, Central: Bowling Green, Columbia, Elizabethtown and Owensboro; 16,241cases;
Dan Goyette, Jefferson: Louisville; 24,495 cases;
Bette Niemi , **Capital** located in Frankfort with statewide coverage

George Sornberger
Trial Division Director

These 8 trial leaders have been doing public defender work with DPA for a combined 115 years. They provide leadership and perspective with their years of criminal defense experience.

Each of the full-time offices works in partnership with private criminal defense attorneys by contracting with attorneys in private practice to provide conflict representation.

In commenting on the regional trial system, Public Advocate Ernie Lewis said, "I believe that a full-time system can provide for more effective counsel at the trial stage of the case than any other method that I know. Essential to that belief is my commitment to good leadership and supervision by directing attorneys, regional managers, and the Trial Division Director. Each of these Trial Division leaders plays an important role in ensuring a high quality delivery system at the trial level. One component of our full-time system that Kentucky has borrowed from Minnesota is the regional system. Our regional managers are truly the Public Advocates in a particular region of the state. By that I mean that they are charged with ensuring the effective delivery of indigent defense counsel in all of the counties and offices in their region. I am very clear that placing the responsibility for the effective delivery of counsel in the regional manager, while at the same time giving him or her resources to solve regional problems, is the best way to make sure that effective counsel is being delivered on the ground."

The map indicates Kentucky's regional trial leaders and their geographical areas of responsibility.

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Kentucky's Statewide Defender Trial Regions and Regional Leaders

Tom Glover

Dan Goyette

Rob Riley

Bette Niemi

Rob Sexton

Lynda Campbell

Roger Gibbs

The 26 trial office locations, addresses, phone, fax and E-mail contacts are as follows:

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Bowling Green (Trial)
1001 Center Street, Suite 301
Bowling Green, KY 42101-2192
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E-mail: rhoward@mail.pa.state.ky.us

Columbia (Trial)
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Covington (Trial)
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E-mail: tbryant@mail.pa.state.ky.us

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Education for Offenders

The educational system and the criminal justice system need to work together to ensure that those citizens who come before our local judges with educational needs are identified and provided the needed services. As public defenders know, research indicates a correlation between educational level and crime. Lack of education often contributes to the reason that the person is in court. Without the proper tools to become a contributing member of society, many offenders will be in court repeatedly. One of the tools to prevent repeat offenses is education. KRS 533.200 (enacted in 1988) provides for alternative sentencing by allowing a judge to sentence a person to attend and successfully complete a program designed to improve his reading, living, and employment skills.

During meetings of the Task Force on Adult Education we heard testimony on how this statute could be utilized to equip offenders with the necessary skills to become better workers, parents, and citizens and to reduce the recidivism rate. The Kentucky 2000 General Assembly passed Senate Bill 1which included a provision requiring the Department of Adult Education and Literacy to create an awareness program for circuit and district judges of the provisions of KRS 533.200.

The Department for Adult Education and Literacy funds a network of local instructional programs throughout the Commonwealth designed to assist adults in acquiring knowledge and developing the potential to achieve their goals in the workplace, at home, and in *society.* We would like to work with everyone involved in any phase of the criminal justice system to make sure those with educational needs have access to our programs so that they may become *contributing* rather than *offending* members of our society. We are currently working with judges, prosecutors, public defenders, court workers, and our own local education providers to ensure that all are aware of how we can work together to impact the lives of those needing our services. *Appropriate candidates must be sixteen years of age or older and officially withdrawn from school to be eligible for our programs.*

Not every client that you encounter should be sentenced to an educational program, but many offenders could benefit from our services in lieu of traditional sentencing.

Our services include:

- Basic adult education (serving those assessed to be functioning at grade levels 0-8). The program provides basic education skills to adults in their roles as learners, workers, family members and citizens to enable them to develop coping skills for living and wage earning, and to better their self-concepts.
- General Education Development — GED (for those assessed to be functioning at grade levels 9-12) GED classes provide educational opportunities to adult learners who wish to continue beyond adult education classes to enable them to achieve a high school equivalency diploma, and to enable them to increase their wage earning potential.
- Family Literacy is an intensive on-going program that provides educational opportunities for family members to learn together. Family literacy affects real and measurable change in the lives of adults and children through combinations of adult education, children's education, parent groups, and structured parent/child interactions as provided by certified/trained staff.
- English as a Second Language (ESL) classes provide non-English speaking adult learners with familiarity and instruction in English language, societal coping skills, improved self-concept, and job-seeking skills.

During the Circuit Judge's Judicial College and the District Judge's Judicial College each judge will be provided the name of the contact person in our local adult education program in their area. Therefore, judges should soon become more aware of the availability of educational programs and, when appropriate, consider the use of these programs in sentencing.

If you would like to know more about the adult educational programs in your area, you may access our web site at www.adulted.state.ky.us and click on providers. This contact person can provide information about program services, hours of operation, location of programs as well as information concerning which individuals may best be served by our programs. We are working with the Department of Public Advocacy to create a direct link from your web site to our provider list. If you have other questions or trouble identifying the appropriate person, you may call the Department for Adult Education and Literacy at 502-564-5114 and ask for Dr. B. J. Helton.

We hope that you will talk to the adult education provider in your area and consider proposing alternative sentencing to the court when appropriate. Your judicious use of this statute can help many become functioning members of the workplace, home, and society and alleviate the need for incarceration. ■

Cheryl D. King, Commissioner
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Kentucky Case Law Review

Shannon Dupree

***Ware v. Commonwealth*, Ky., ____S.W. 3d____ (6/14/01) - Affirmed**

Pursuant to a conditional guilty plea, Mr. Ware was convicted of various offenses, including being a persistent felony offender in the first degree. The issue on appeal is whether Mr. Ware's two prior convictions in North Carolina qualify as "previous felony convictions" for purposes of PFO enhancement. KRS 532.080 (3)(a) defines "previous felony conviction" as follows: "As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided: (a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefore; and…."

Here, Mr. Ware had two previous convictions in North Carolina. Both offenses are designated as misdemeanors under North Carolina law. However, each offense carried a maximum penalty of up to two years imprisonment. KRS 532.080 (3) (a) requires that an out-of-state conviction be for a "crime" and that a sentence of one year or more was "imposed." Mr. Ware received over a year for each of his previous North Carolina convictions, and thus, both are considered previous felony convictions for purposes of PFO enhancement.

The Court also resolved a perceived conflict between two prior decisions in *Davis v. Commonwealth*, Ky., 728 S.W.2d 532 (1987) and *Commonwealth v. Lundergan*, Ky., 847 S.W.2d 729 (1993). *Davis* held that a conviction for which a sentence of "six months to five years probated for three years" was imposed was a "previous felony conviction" as defined in KRS 532.080 (3), because the maximum time which could be served under the imposed sentence was at least one year. *Lundergan* dealt with whether a certain offense was a felony or a misdemeanor for purposes of the one-year statute of limitations applicable only to misdemeanors. The perceived conflict between those two opinions arose because the plurality opinion in *Lundergan* purported to overrule *Davis*. The Court pointed out there was no need to overrule *Davis* in order to conclude that the offense considered in *Lundergan* was a misdemeanor. Also, because only three justices concurred in overruling *Davis*, it was not a majority and thus, *Davis* was not overruled.

***Garret v. Commonwealth*, Ky. ____S.W.3d____(6/14/01) - Affirmed**

Mr. Garrett was convicted of rape, sodomy, first and second degree sexual abuse, all perpetrated against his biological daughter, TJ. Mr. Garrett asserted there was insufficient evidence to convict him of the rape charge because TJ's credibility was insufficient to support a conviction absent corroboration and that Dr. Bright's testimony did not corroborate TJ's claim that she had engaged in sexual intercourse. The Court held corroboration in a child sexual abuse case is required only if the unsupported testimony of the victim is not contradictory, or incredible or inherently improbable. *Robinson v. Commonwealth*, Ky., 459 S.W.2d 147, 150 (1970). Otherwise, discrepancies in the victim's testimony are matters of credibility going to the weight to be given by the jury to the child's testimony. TJ's testimony was contradictory at times to her previous statements to the police. To the extent that her testimony as to her age and appellant's conduct corresponded with the year and the offense charged in the indictment, Appellant's motions for directed verdict were overruled. To the extent it did not, the motions were granted. Thus, the trial judge carefully considered the evidence in ruling on the motion for directed verdicts of acquittal, and the jury found Appellant guilty only of those offenses that were supported by TJ's testimony at trial. There was nothing so contradictory, incredible or inherently improbable about this testimony as to require corroboration.

Appellant next contended Dr. Bright (whom examined the victim) was an examining physician, not a treating physician, and thus, Dr. Bright's repetition of the history related to her by the victim should have been excluded on grounds that its prejudicial effect outweighed its probative value. The prosecution argued Dr. Bright was both an examining physician and a treating physician and thus, there was no need to apply the balancing test in *Drumm v. Commonwealth*, Ky., 783 S.W.2d 380. *Drumm* required exclusion of hearsay statements of medical history related to examining physicians if the prejudicial effect outweighs probative value, taking into account that when such statements are not made for the purpose of treatment they have less inherent reliability than evidence admitted under the traditional common-law standard underlying the physician treatment rule. Here, the Court held the distinction between treating and examining physicians was eliminated by the adoption of KRE 803(4), thus the balancing test as described in *Drumm* no longer applies. The Court overruled *Miller v. Commonwealth*, Ky., 925 S.W.2d 449 (1995) to the extent it could be interpreted otherwise. KRE 803 (4) includes statements made for purposes of medical treatment or diagnosis as an exception to the hearsay rule. The Court pointed out, however, that a statement made to an examining physician for the purpose of diagnosis is subject to exclusion if its probative value is *substantially* outweighed by the danger of *undue* prejudice, confusion of the issues, or mis-

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leading the jury or by considerations of undue delay, or needless presentation of cumulative evidence. KRE 403.

Another issue raised on appeal involved the victim's diary. TJ admitted she had kept a diary during part of the period when the sexual abuse was supposed to have occurred, and that the diary did not include the detailed acts of sexual abuse described in her testimony. On cross-examination, defense counsel had TJ read certain entries in the diary in which she had written negative remarks about Appellant. On redirect examination, the prosecutor authenticated and offered into evidence one redacted page of the diary that contained a statement that "my dad got mad because he wanted…to f— me again." Defense counsel objected to the prosecutor's motion to introduce one page, but did not move to introduce the entire diary. The trial judge admitted the page offered by the prosecutor. The Court held KRE 106 does not require introduction of the complete document merely because a portion of the document is offered into evidence. The fairness aspect of KRE 106 is intended to prevent a misleading impression as a result of an incomplete reproduction of a statement. The diary itself was not introduced by avowal and was not included in the record on appeal. The Court also pointed out this issue was not preserved for review, nor was the issue preserved by avowal. KRE 103(a)(2) and RCr 9.52 require avowal testimony to authenticate the document or object, then a tender of the document or object to the court as an avowal exhibit.

Appellant argued the trial court erred when it sustained the prosecutor's objection during defense counsel's closing argument. At the time of the trial, the victim was obviously pregnant. During voir dire, the prosecutor informed the jury that the victim was pregnant, and that the Commonwealth was in no way alleging Appellant had anything to do with the pregnancy. It was agreed the victim would not be questioned about her pregnancy, presumably in accordance with KRE 412 (rape shield law), which prohibits the introduction of evidence of a victim's past sexual behavior. During the trial Dr. Bright testified that child sexual abuse victims are often too inexperienced to accurately describe the extent of penetration that occurred during an alleged act of sexual intercourse. During closing argument, defense counsel remarked that since the victim was pregnant, she now knew how much penetration constituted sexual intercourse. The Court stated this remark did not relate so much to the fact that the victim was pregnant as to the fact that her pregnancy proved familiarity with sexual intercourse and was but a disingenuous attempt to circumvent the rape shield law. Consequently, the Court held this was not proper subject for closing argument.

In a concurring opinion, Chief Justice Lambert and Justice Stumbo did not agree that KRE 803(4) should supplant the rule articulated in *Drumm*. Without such a rule of exclusion, inevitably the jury or trier of fact will tend to give greater weight to the testimony of the witness simply because it is repeated by the physician, when in fact, there is only one version and the physician is merely repeating it.

Justice Keller wrote a concurring opinion stating he believed the trial court improperly instructed the jury to disregard a portion of defense counsel's closing argument. Justice Keller opined that appellant's trial counsel's commentary regarding the complaining witness's knowledge of sexual penetration at the time of trial fell within the latitude allowed attorneys during closing argument, but did not amount to reversible error.

Phon v. Commonwealth*, Ky. App., *____S.W.3d___(7/13/01) - Affirmed

Phon appealed from a Warren Circuit court order denying his motion for relief alleging ineffective assistance of trial counsel pursuant to RCr 11.42. Phon, a 16-year-old, was transferred to Warren Circuit Court as a youthful offender. He was indicted on two counts of murder, first-degree assault, and first-degree robbery and burglary. The Commonwealth sought the death penalty for the two murders.

Phon's mitigation defense was that he was acting under duress of 26-year-old Sananikone, one of his four co-defendants and the leader of a gang to which Phon belonged. The trial court denied defense counsel's request of a severance of Phon's trial from Sananikone.

After the date of the offense, but prior to trial, KRS 532.030(1) was amended to permit the imposition of life without the possibility of parole. Phon entered an open-ended guilty plea with no recommendation as to sentencing on any of the charges by the Commonwealth. The jury recommended Phon be sentenced to life without parole for each of the murders and to twenty years for each of the other crimes.

Before Phon was formally sentenced, he filed a *pro se* motion for post-conviction relief alleging ineffective assistance of counsel. His trial attorney met with Phon and explained that if Phon were successful in getting the judgment set aside for *any* reason, he would be eligible for the death penalty. The defense attorney left that meeting with the understanding Phon was going to withdraw his motion. Defense attorney did not file a notice of appeal. Phon did not withdraw his motion, and alleged ineffective assistance of counsel for advising him to enter an open guilty plea, failing to advise him life without parole was a possible sentence, and failing to file a notice of appeal.

The Court of Appeals held that the record did not support Phon's claims. In the context of a guilty plea, a defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 369-70. 88 L.Ed.2d 203 (1985). *See also Taylor v. Commonwealth*, Ky. App., 724 S.W.2d 223, 226 (1986). Counsel advised the open plea in

order to avoid the death penalty. Trial counsel's strategy was not unreasonable.

In conjunction with his guilty plea, Phon signed a consent that would permit the jury to consider life without parole as a possible sentence. The Court held that the record demonstrated Phon knew life without parole was a possible outcome of his guilty plea. In addition to the written consent form, the trial court informed him of the possible sentence in its colloquy when he entered his plea.

Finally, the Court held that a "defendant must establish that there is a reasonable probability that but for counsel's deficient failure to consult him about an appeal, he would have timely appealed." *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985, 999 (2000). Because Phon pled guilty he would have only been able to appeal errors from the sentencing phase. Had his appeal been successful, Phon would have faced imposition of the death penalty. The record supports the trial court's finding that counsel reasonably believed Phon did not want to pursue the appeal. ■

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CAPITAL CASE REVIEW

U.S. Supreme Court

***Penry v. Johnson*, 121 S.Ct. 1910 (rendered June 4, 2001)**

Majority: Parts I, II and IIIA Unanimous Part IIIB: O'Connor (writing), Stevens, Kennedy, Souter, Ginsburg, Breyer
Minority: Thomas (writing), Rehnquist, Scalia

The Supreme Court considered whether the jury instructions at Johnny Paul Penry's 1991 trial comported with the dictates of *Penry v. Lynaugh*, 492 U.S. 302 (1989) and whether the admission of statements from a psychiatric report based on an uncounseled interview violated *Estelle v. Smith*, 451 U.S. 454 (1981).

Mental Retardation as Mitigation

In Texas, capital sentencing juries answer three questions or "special issues": 1) whether the conduct was deliberate and committed with the reasonable expectation that death would result; 2) whether the defendant would be "a continuing threat to society" and 3) whether the conduct was unreasonable in light of any provocation by the victim. If the answers are all affirmative, the defendant is sentenced to death; any "no" answer requires a life sentence. *Penry v. Johnson*, 121 S.Ct. 1910, 1916.

In *Penry I*, the Court sent this case back for retrial because it found the instructions on the mitigation inadequate in that the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering its sentencing decision. *Penry v. Lynaugh*, 492 U.S. at 319.

At Penry's retrial, the only difference in the special issues instructions compared to those in *Penry I* was a supplemental instruction to "consider mitigating circumstances, if any," supported by evidence presented at either phase of the trial. Mitigating circumstances were defined as "any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case." The verdict form the jury used did not mention mitigation at all. The jury answered yes to all three special issues questions. *Id*., at 1917.

The Texas Court of Criminal Appeals found the supplemental instruction met *Penry I* because the jury could consider mitigation not relevant to the special issues and/or beyond the scope of the special issues. *Penry v. State*, 903 S.W.2d 715, 765 (Tex. App. 1995).

AEDPA "Contrary To" Or "Unreasonable Application Of" Standard

The Supreme Court was somewhat confused by the Texas court's ruling, seeing two possible rationales: 1) that *Penry I* was satisfied by giving a supplemental instruction; or 2) that the substance of the instruction satisfied *Penry I*. Although the Court believed the latter more likely, to the extent the Texas court believed simply giving a second instruction was enough, it applied *Penry I* unreasonably. *Penry I* does not hold that merely mentioning mitigators to a capital jury is enough; it also does not hold that informing the jury that it may "consider" mitigation satisfies the Eighth Amendment. Only after the jury is "given a 'vehicle for expressing its 'reasoned moral response'" to the evidence adduced at trial, can courts be sure the jury "treated the defendant as a 'uniquely individual human being'" and made a reliable determination that death is the appropriate punishment. *Id*., at

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1921, quoting *Penry I*, 492 U.S. at 328; *Woodson v. North Carolina*, 428 U.S. 280, 304, 305.

Simply rewriting the instruction in the fashion the Court indicated in *Penry I*—including in the definition of "deliberate" directions for the jury to consider Penry's mitigation as it bore on his personal culpability—would have sufficed. *Id*., at 1923, citing *Penry I* at 323. The trial court had refused to include either of the two different definitions of "deliberately" Penry offered. *Id*. Another way to have complied with *Penry I* would have been "[a] clearly drafted catchall instruction" that requires the jury to decide "whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." *Penry II*, 111 S.Ct. at 1910, quoting Tex. Crim. Code Ann. § 37.071(2)(e)(1) (Vernon Supp. 2001).

Lessons for Kentucky Practitioners

Although the Court did not state specifically, trial lawyers should continue to strive for instructions telling jurors that the mechanism for an individualized determination of the proper sentence for each particular defendant is a balancing process between mitigation and aggravation. Nothing else can provide that "individualized determination." A possible avenue for appellate and post-conviction attorneys to explore in briefing or arguing an issue would be to review the mitigation instruction presented and then show the reviewing court how jurors under such instructions could not give effect to and consider the mitigation.[1]

Another possible use would be to argue for a jury instruction in cases where the mitigating evidence was relevant but did not fit within any of the enumerated statutory mitigating circumstances. Counsel should remind trial courts that in *Smith v. Commonwealth*, Ky., 599 S.W.2d 900 (1980), the Supreme Court held that mitigating evidence is "all evidence that would tend to excuse or alleviate" a defendant's responsibility and that KRS 532.025(2)(b) also provides for any mitigating circumstance "otherwise authorized by law." *Jacobs v. Commonwealth*, Ky., 870 S.W.2d 412 (1994) notes that under 532.025(2)(b), trial courts are permitted to "submit redeeming evidence to the jury." The *Jacobs* court also stated the familiar *Lockett v. Ohio*, 438 U.S. 586 (1978) requirement that "the sentencing body consider any relevant evidence offered by the defense in mitigation of capital punishment." Should a trial court appear reluctant to give the juror an instruction on that particular mitigating evidence, counsel could remind the court that jurors must be able to make the "reasoned moral response" reaffirmed in *Penry*. Otherwise, the sentencing decision could be considered capricious and unconstitutional. *Penry II*, quoting *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976)(plurality decision).

Estelle v. Smith

On cross, a defense neuropsychologist testified that as part of his examination, he reviewed a 1977 report prepared to determine Penry's competency on an unrelated rape charge. The expert also read a portion of that report stating the examiner's opinion that Penry would be dangerous if released from custody. *Id*., at 1916.

On appeal, Penry argued that admission of the 1977 report violated his right to be free from self-incrimination because he was never warned that those statements might later be used against him. The Texas Court of Criminal Appeals disagreed, stating that the doctor was not acting as an agent of the state gathering information to be used against Penry. *Penry v. State*, 903 S.W.2d at 759.

The Supreme Court noted several distinctions in between *Penry* and *Estelle*. *Penry*, 120 S.Ct. at 1919. The *Estelle* defendant did not place his mental status at issue, while Penry contended in both trials that his mental status was the central issue. In *Estelle*, the trial court ordered the competency evaluation and the state chose the examiner. By contrast, Penry's defense counsel requested the exam. In *Estelle*, the state called the examiner as part of its case-in-chief; in *Penry*, only during the state's cross did the jury hear the 1977 report. Lastly, in *Estelle*, the defendant was charged with a capital crime and his future dangerousness was an issue. In *Penry*, the report regarding his future dangerousness was made years before the events for which he was on trial for his life.

The Court cited those distinctions as one of the reasons it did not find the Texas court's decision "contrary to" or "an unreasonable application of" *Estelle*. Other reasons include language in *Estelle* limiting the holding to the circumstances presented in that case. Further, the Court noted, a Fifth Amendment analysis "might be different" when a capital defendant "'intends to introduce psychiatric evidence at the penalty phase.'" *Id*., at 1919, citing *Estelle*, 451 U.S. at 472.

Lastly, Penry could not establish a "substantial and injurious effect or influence" on the jury's verdict. *Id*., at 1920, citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Although the excerpt from the 1977 report bolstered the state's argument that Penry would be dangerous in the future, the jury heard other opinions regarding that fact, including those of four prison officials, two state psychiatrists and one defense psychiatrist. *Id*., at 1921.

Dissent

The dissenters believed the Texas Court of Criminal Appeals had applied *Penry I* reasonably. The jury knew it could consider Penry's evidence of mental retardation and child abuse as mitigation, it must give effect to the evidence and if it found the mitigation enough to preclude death, one of the special issues must be answered in the negative. *Id*., at 1925-26.

Kentucky Supreme Court

***Osborne v. Commonwealth*, Ky., — S.W.2d — (May 17, 2001)**

Majority: Cooper (writing), Lambert, Johnstone, Stumbo, Wintersheimer
Concurrence: Keller (writing), Graves

The bodies of Sam and Lillian Davenport, an elderly Whitley County couple, were discovered in the remains of their burned residence. The morning after the murders, Larry Osborne told police that the night before, he had driven past the Davenport home and heard glass breaking. He had been alarmed enough that when he got to Joe Reid's home, he had asked his mother to accompany him back to their home. *Osborne v. Commonwealth*, Ky., 43 S.W.3d 234, 236 (2001). Joe Reid's written statement said essentially the same.

Reid failed a polygraph two weeks later and then told police Osborne stopped at the Davenport house. When Reid realized Osborne was going to break in, he attempted to start the dirt bike the two were on, but the chain fell off. After Osborne broke out a window in the Davenport home, Reid was able to repair the bike and drove off. When he returned, Osborne was waiting with a pocketful of money.

In his grand jury testimony, Reid changed the story: as Reid attempted to drive the dirt bike off, he heard glass breaking and two gunshots and after Osborne entered the residence, Reid heard more glass breaking, another gunshot and a woman screaming. Osborne told Reid that his mother had assisted in the crime and threatened to beat Reid if Reid told anyone what had happened. *Id*., at 237.

Juvenile Transfer Hearing

Osborne was 17 when the crimes were committed. The juvenile petition charged him with the two murders, arson first and robbery first, but not burglary first. When he was transferred to Circuit Court, he was also charged with burglary first. Osborne argued that he could not be charged with burglary first, nor that crime used as an aggravator in the circuit court proceedings since he had not been charged with that crime as a juvenile.

The Supreme Court disagreed, stating that it is the offender, not the offense which is transferred. Further, grand juries are free to indict youthful offenders for other offenses arising out of the same course of conduct which caused the transfer in the first place. *Id*., 238-239, citing KRS 610.015(2) and KRS 635.020(8).

The court did not err when it did not make written findings regarding each of the factors enumerated in KRS 640.010(2)(b). It is sufficient for a transfer order to cite that "all the factors" were considered and enumerating those factors (in this case, three) that it found to apply. *Id*., at 239.

Improper Admission of Hearsay Testimony

Joe Reid drowned in July 1998, four months before trial began. At the trial, a detective read a transcript of Reid's grand jury testimony. The information was hearsay: it was offered to prove the truth of the matter asserted and did not fall within any exception to hearsay. KRE 801(c), KRE 802. The Court also held that it did not matter that Osborne was allowed to impeach by cross-examining the detective about Reid's prior inconsistent statements. The evidence was incompetent and could not be rehabilitated through cross-examination.

The trial court had held that Reid's statement was admissible as a statement against interest in that it exposed him to liability for criminal facilitation. KRS 506.080(1), KRE 804(b)(3). The Supreme Court disagreed. Reid's act of putting the chain back on the motorcycle did not provide Osborne with means or opportunity to rob and kill the victims, or to burglarize and burn their home. *Id*., at 240. Thus, Reid's statement did not expose him to any risk of prosecution for facilitation.

On appeal, the Commonwealth argued that Reid had exposed himself to liability for hindering prosecution or apprehension, a crime which requires intent to hinder one of these things, plus the actual rendering of assistance. KRS 520.120, 130. Again, the Court disagreed. Reid did not "'provide'" Osborne with the motorcycle; it belonged to a third party. Further, if Reid had not repaired the chain, Osborne could have done so. This "simple act" was insufficient to expose Reid to criminal liability for hindering prosecution or apprehension. No deal was offered to Reid and no effort was ever made to charge him with any crime. *Id*.

No Corroboration

The Court pointed out that KRE 804(b)(3) requires that "a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In this case, there was "a complete lack" of any corroboration that the chain came off or that Reid put it back on.

Finally, assuming Reid's statements were admissible, reading the entire contents of his testimony was error. Statements against penal interest are "a single declaration or remark," not the total of a person's testimony. *Osborne*, at 241, citing *Williamson v. United States*, 512 U.S. 594 (1994) and *Vincent v. Seabold*, 226 F.3d 681 (6th Cir. 2000).

Each statement within the entire narrative must be examined individually to determine whether it inculpates the declarant. If not, the statement is inadmissible. *Id*., citing *Williamson* and *Gabow v. Commonwealth*, Ky., 34 S.W.3d 63, 78 n.12 (2000). In this case, apart from one statement about putting the chain back on the dirt bike, the remainder of Reid's statement was that he was an innocent bystander. Therefore, the remainder of his statement was not admissible as against his interest.

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When faced with this scenario, trial, appellate and post-conviction practitioners should include within motions and appellate arguments such an examination.

The Commonwealth asserted at oral argument that any statement made under oath is potentially one against interest because the threat of perjury charges is present. The Court declined to extend the exception to those lengths because of the impracticality of that argument. *Id*., at 241.

911 Audiotape

On the other hand, an audiotape of the 911 call Osborne's mother made was not inadmissible hearsay. The Commonwealth's theory was that the statements made during the 911 call were false and proved that Osborne and his mother wanted to divert suspicion from them. Thus, the 911 call was relevant in and of itself. *Id*., at 242. The prosecution argued in closing that coughing heard in the background of the 911 call was Osborne coughing smoke and soot out of his lungs. Although the inference was speculative, it was not so unreasonable as to require reversal. *Id.*

Video of Crime Route

The Commonwealth introduced a videotape showing the routes, distances and approximate times it would take to travel on the night of the murders. Although the crimes happened at night and Osborne and Reid were on a motorcycle, the video was made while driving a police cruiser in the daylight and not in the sequence in which the travel had occurred. The presumed purpose of the video was to that the events of that night could have happened in a relatively short time. It made no difference that the video was made under different conditions, the video simply added credence to the Commonwealth's case, and any questions regarding the video were brought out on cross-examination. The judge did not abuse his discretion in admitting the video into evidence. *Id.*, at 243.

Glass Particles

Osborne argued on appeal that glass particles found in scrapings of his clothing should have been excluded as irrelevant since they did not match glass particles found at several different locations in the Davenport house. Counsel did not object to admission of this evidence at trial. The Court found such an omission was a legitimate trial tactic, since the evidence tended to exculpate Osborne. *Id.* In his closing argument, the prosecutor did not misstate the evidence when he said the jury could use the presence of glass particles on Osborne's clothing as evidence of his guilt: the glass on Osborne's clothing could have come from other places in the Davenport house. *Id*., at 244.

Failure to Instruct on Manslaughter First, Reckless Homicide

The trial court instructed on intentional and wanton murder and manslaughter second. The Court reiterated that instructions on lesser offenses, such as manslaughter first and reckless homicide, are appropriate only if there is evidence a reasonable juror could have reasonable doubt as to guilt on the greater charge, but believe beyond a reasonable doubt the defendant is guilty of the lesser charge. *Id*., at 244.

On appeal, Osborne argued that the Court should apply *Commonwealth v. Wolford*, Ky., 4 S.W.3d 534 (1999) (where evidence is entirely circumstantial and does not conclusively establish defendant's state of mind, trial court should instruct on all degrees of homicide and let jury decide). Here, the victims dead of smoke inhalation from the arson. Reid testified that Osborne intended to set the fire. An accelerant was found at the scene and on the clothing of one of the victims. The Court held that this evidence did not support an inference that Osborne set the fire merely with intent to injure the victims (manslaughter first) or that a reasonable person would have failed to perceive the risk that setting fire to an occupied residence would kill the occupants (reckless homicide). *Id.*

Concurrence

Although Justice Keller agreed that Osborne's convictions must be reversed, he wrote separately to express his belief that the majority adopted an overly narrow construction of the KRE 804(b)(3) statement against interest exception. "The majority's analysis appears to suggest that only those statements which, standing alone, establish a prima facie case for a criminal offense against the declarant fall within the exception." *Id*., at 245. Reid admitted he was present, waited and observed the events, repaired the chain, heard gunshots and screams coming from the house, and rode away with Osborne.

Justice Keller argued that the rule covers evidence which would have probative value, not just outright confessions. *Id*., at 246, citing Kentucky Evidence Rules Study Committee Commentary to KRE 804(b)(3), Lawson, *Kentucky Evidence Law Handbook* (3rd), §8.45 at 425 (1993) and *United States v. Thomas*, 571 F.2d 285 (5th Cir. 1978). The only element missing to prove facilitation is "knowingly providing the means or opportunity." Reid could have facilitated the crimes by acting as a lookout—and there were reasonable inferences to be made from the evidence that Reid had done so. *Id.*

***Thompson v. Commonwealth*, Ky., — S.W.3d —, (June 14, 2001)**

Majority: Lambert, Cooper, Johnstone, Graves, Keller, Stumbo
Minority: Wintersheimer (writing)

***Johnson v. Commonwealth*, unpublished, (June 14, 2001)**

Majority: Johnstone (writing), Lambert, Cooper, Graves, Keller, Stumbo,
Minority: Wintersheimer (writing)

Eugene Thompson and Don Johnson respectively pled guilty to various crimes and were sentenced to death. The Supreme Court remanded for 1) a determination in each case whether a retrospective competency hearing would not be legally possible; and 2) if so, for evidentiary hearings as to whether Thompson and Johnson were competent to plead guilty prior to doing so.

Thompson

In 1995, when the trial court accepted Thompson's guilty plea, it relied on defense counsel's concession[2] that Thompson was competent and a report submitted by Dr. Candace Walker, of Kentucky Correctional Psychiatric Center (KCPC). However, there was also an affidavit by a defense psychiatrist stating Thompson had symptoms indicative of brain injury. After stating his doubts regarding Thompson's competency, the court did not hold the statutorily mandated hearing, but determined Thompson was competent to plead guilty. KRS 504.100(1), (3).

Johnson

During the guilty plea proceedings, defense counsel also conceded Johnson's competence. The trial court relied on that concession as well as the psychological reports in the record. However, one of those reports, from a physician at KCPC, stated his concerns regarding Johnson's competency. In the face of those unanswered questions, the Court found that, as in *Thompson*, the dictates of KRS 504.100(1), and (3) were not met.

Remedy

The Court reexamined its holding in *Hayden v. Commonwealth*, Ky., 563 S.W.2d 720 (1978), which states that failure to hold a competency hearing requires reversal. In that case, the Court expressed a preference for retrospective competency hearings, but felt compelled by *Drope v. Missouri*, 420 U.S. 162 (1975) and *Pate v. Robinson*, 383 U.S. 375 (1966), to hold that reversal of such cases was the proper remedy.

However, in ensuing years, various courts examining the same issue expressed opinions disfavoring such hearings while finding them permissible under a due process analysis. *Id.*, slip op. at 4, citations omitted. Thus, the Court overruled that part of *Hayden* which demanded reversal outright.

The Court made clear, though, that in order to meet constitutional muster, retrospective competency hearings must be based on evidence related to observations made or knowledge possessed at the time of the trial, or presumably, the guilty plea. *Id*., at 5. Other factors include: 1) the length of time between the hearing and the trial or plea[3]; 2) the availability of a written or video record of the proceedings; 3) the existence of mental exams conducted close in time to the trial or plea; 4) the availability of non-experts, including counsel and the court, who observed and interacted with the defendant.

Each decision is made on a case-by-case basis, by determining "whether the 'quantity and quality of available evidence is adequate to arrive at an assessment that could be labeled as more than mere speculation.'" *Id.*, at 6, quoting *Martin v. Estelle*, 583 F.2d 1373, 1374 (5th Cir. 1978).

The Court remanded to the Circuit Court, with directions to 1) determine whether a retrospective competency hearing could be held, and 2) if so, to conduct such a hearing.

Endnotes

1. Thanks to Public Advocate Ernie Lewis and Deputy Public Advocate Ed Monahan for their exposition of the *Lockett/Eddings* line of cases in the brief they filed for Eugene Gall in the Sixth Circuit.
2. Counsel's concession may have been part of an overall strategy to have Thompson sentenced by the trial court, rather than by the jury.
3. The Court noted in *Cremeans v. Chapleau*, 62 F.3d 167, 170 (6th Cir. 1995), that the passage of seven years between the trial and the retrospective competency hearing did not fail to meet constitutional standards. ■

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"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

6th Circuit Review

Emily Holt

Bragan v. Poindexter
249 F.3d 476 (6th Cir. 4/23/01)

Prosecutorial Vindictiveness

In 1977, Bragan was convicted in Tennessee state court of first-degree murder and sentenced to 99 years imprisonment. In spring 1992, Bragan's petition for writ of habeas corpus was granted by a federal district court because of prosecutorial misconduct during the trial. The state opted not to immediately retry Bragan and released him from prison.

Bragan filed a complaint with the Tennessee bar regarding prosecutors Gary Gerbitz and Stan Lanzo. Bragan also began to travel the media circuit, appearing on TV and radio talk shows, in newspaper articles, and at various public events, complaining about the bad treatment he received at the hands of Gerbitz and Lanzo. He wrote a book, *Beyond Prison Walls*, about his ordeal. In fall 1992, Lanzo offered Bragan a plea deal in which Bragan would plead guilty to second-degree murder in exchange for time served. This was rejected by Bragan. In April 1993, Bragan was re-arraigned on the murder charge. Gerbitz and Lanzo requested and received from the court a gag order prohibiting Bragan from talking about the case. A prosecutor from another judicial district, James Taylor, was appointed to try Bragan.

Test: "Realistic Likelihood of Vindictiveness" for the Prosecutor's Action

On federal habeas review, Bragan claims he was retried because of prosecutorial vindictiveness—that the charges were reinstated in retaliation of Bragan's exercise of his 1st amendment rights in publicizing his ordeal and filing bar complaints against the original prosecutors. A prosecution which is the result of prosecutorial vindictiveness is constitutionally prohibited. *U.S. v. Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989). To prove such a claim, a defendant normally must show that there existed a "realistic likelihood of vindictiveness" for the prosecutor's action. *U.S. v. Andrews*, 633 F.2d 449, 453 (6th Cir. 1980). The prosecutor must have "some stake" in deterring the defendant's exercise of his rights, and the prosecutor's conduct must somehow be unreasonable. *U.S. v. Anderson*, 923 F.2d 450, 453-454 (6th Cir. 1991). If a court finds that a realistic likelihood of vindictiveness exists, the burden shifts to the prosecutor to disprove or justify his actions. *Andrews*, 456. The explanation must be objective and on-the-record. Two acceptable justifications are discovery of previously unknown evidence and prior legal impossibility. *Id.* If the presumption of vindictiveness is not rebutted, charges should be dismissed. If the government does present rebuttal evidence, the defendant must prove that actual vindictiveness occurred and the proffered justification is pretextual.

The original prosecutors, Gerbitz and Lanzo, did have a stake in deterring Bragan's exercise of his 1st amendment rights. Disciplinary actions were proceeding against them and their motion to gag Bragan illustrates their awareness of his prior speech. Bragan, the Court concludes, has presented some evidence to indicate that the prosecutors' conduct was unreasonable. The State failed to reinstate charges against Petitioner when the habeas petition was first granted. No new facts had been discovered when the charges were reinstated a year later. Further it is suspicious that the original prosecutors opted not to testify in the habeas evidentiary hearing in defense of their actions. Because the prosecutors did have a significant and personal stake in deterring Bragan's 1st amendment rights, a "reasonable likelihood of vindictiveness" has been established.

Appointment of New Prosecutor Rebuts Presumption of Vindictiveness

The Court ultimately concludes that the presumption of vindictiveness was rebutted by the fact that while Gerbitz and Lanzo may have acted unreasonably, new prosecutor Taylor did not. He had no stake in the disciplinary proceedings against Lanzo and Gerbitz. He conducted an independent investigation of the case. He did not discuss the case with Lanzo and Gerbitz and was not friends with either of them. Habeas relief is accordingly denied.

U.S. v. Hardin
248 F.3d 489 (6th Cir. 4/23/01)

Possession of Firearm "in Connection With" Possession of Narcotics

Hardin plead guilty to various drug crimes. His sentence was increased pursuant to the federal sentencing guidelines because the district court concluded that he possessed a firearm "in connection with" possession of narcotics with intent to distribute. This case is addressed because of its relevance to KRS 218A.992 which provides sentence enhancement for "any person who is convicted of any violation of this chapter [drug chapter] who was at the time of the commission of this offense in possession of a firearm."

Hardin was arrested in his bedroom. His wife, who was also in bed, consented to a search of the house. The following items were found in the bedroom: cocaine hydrochloride, a Smith and Wesson .9 mm pistol, and 2 ammunition maga-

zines each containing seven rounds. The gun, registered to defendant's wife, was on a nightstand. A bag of marijuana was next to the gun, and 54 grams of cocaine was also in the bedroom.

Hardin argues "that the government must prove that the firearm served some purpose with respect to the felonious conduct—that its presence in the room with the drugs was not merely coincidental." The government counters that the burden of proof was met because Hardin plead guilty to simultaneously possessing a firearm and distributing cocaine.

Application of the "Fortress Theory"

The Court determines that Hardin was in constructive possession of the gun because he essentially admitted that fact when he plead guilty to being a felon in possession of a gun in the instant case. The fact that his wife owned it is irrelevant, since the focus is on possession, not ownership. Furthermore, "the fact that the firearm was found in the same room where the gun was stored can lead to the justifiable conclusion that the gun was used in connection with the felony. This Court has held many times that guns are 'tools of the trade' in drug transactions." The "fortress theory" applies to this case, *i.e.* the gun can be assumed to be in the same room with the drugs in order to "protect" the drugs. *See U.S. v. Covert*, 117 F.3d 940 (6th Cir. 1997).

"In Connection With" Analysis is Fact-Specific

The 6th Circuit stresses that the "in connection with" analysis is a fact-specific determination the district court must make each time. The Court is not holding "that the existence of a firearm and narcotics in a room automatically mandates" sentence enhancement. Thus, while this case is not necessarily helpful for our clients, it does not hurt them that much either.

Dunlap v. U.S.
250 F.3d 1001 (6th Cir. 5/7/01)

Equitable Tolling Applies to 28 U.S.C. § 2254 and § 2255 Statute of Limitations

In this case, the 6th Circuit joins the 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 10th, and 11th Circuits, and holds that equitable tolling applies to the one-year statute of limitations period in 28 U.S.C. § 2254 and § 2255 habeas cases. In doing so, the Court overrules a 6th Circuit district court's determination that equitable tolling was not available in § 2255 cases. *Giles v. U.S.*, 6 F.Supp.2d 648 (E.D. Mich. 1998) Equitable tolling is appropriate because the one-year limitation periods under both § 2255 and § 2254 are statutes of limitations, and not jurisdictional requirements.

Court Expressly Rejects "Extraordinary Needs" Test of Other Circuits

In Dunlap's case, however, equitable tolling is inappropriate. The standard of review in equitable tolling cases varies depending on the district court's actions. Where the facts are undisputed or if the district court rules as a matter of law that equitable tolling is unavailable, the *de novo* standard of review shall be applied to the district court's refusal to apply the equitable tolling doctrine. In other cases, an abuse of discretion standard shall be applied. Courts should apply the traditional *Andrews v. Orr* test, 851 F.2d 146 (6th Cir. 1988), in determining whether equitable tolling is appropriate. Five factors should be considered: (1) petitioner's lack of notice of the filing requirement; (2) petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursing one's rights; (4) absence of prejudice to the respondent; and (5) petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. The 6th Circuit expressly rejects the "extraordinary needs" or "rare and exceptional circumstances" tests that many other circuits apply.

In Dunlap's case, he had filed 2 premature habeas petitions, both before his direct appeal was final. Although that shows his "concern and interest in his ability to avail himself of the remedies of the writ of habeas corpus," Dunlap is unable to explain why he then waited 14 months after his direct appeal was final to file his third habeas petition. This is especially egregious in light of the fact that the district court put him on notice of the appropriate deadline when he filed his prior petitions. Judge Siler dissents from this decision. He believes it is unnecessary to consider equitable tolling in this case and that Dunlap's motion should just be dismissed as untimely filed.

Wilson v. Mitchell
250 F.3d 388 (6th Cir. 5/14/01)

In 1972, Wilson had his father's car repaired at an Ohio gas station. He paid for the repairs with a stolen check. He returned to the gas station later that day, complaining about the repairs. The owner of the station, Willie Binford, had already realized that the check was stolen. Binford confronted Wilson about the bad check. Wilson responded by shooting Binford in the head and neck and robbing the store and two employees and fled the scene. In February 1973, Wilson was charged with first-degree murder in the death of Binford. He was not apprehended for 22 years, until February 1995, when he was arrested and also charged with three counts of armed robbery. Wilson was found guilty of murder and all 3 counts of armed robbery. He was sentenced to life imprisonment on the murder conviction and 7-25 years on each of the robbery convictions, all to be served consecutively.

Speedy Trial Claim: Prejudice Depends on Length of Delay Caused by State

Wilson argues that his 6th amendment right to a speedy trial was violated by the 22 year delay between the crime and his trial. Wilson argues that the delay was due to the police department's failure to exercise reasonable diligence in pursuing the arrest warrant. The state argues that the delay was caused by Wilson's attempts to escape apprehension. Ap-

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parently the police did actively pursue the case between 1973 and 1979, but made no attempt to locate Wilson until shortly before his arrest in 1995. Applying the *Barker v. Wingo* balancing test, 407 U.S. 514, 530, 92 S.Ct. 2182 (1972), to the present case, the Court concludes that there has been no violation of Wilson's right to a speedy trial.

An extraordinary length of delay, 22 years, the first prong, is undisputed in this case. This delay "far exceeds this court's guideline that a delay longer than a year is presumptively prejudicial." *U.S. v. Mundt*, 29 F.3d 233, 235 (6th Cir. 1994). The reason for delay is the second prong of the *Barker v. Wingo* test. Reason for delay determines the amount of proof that the petitioner must proffer to show prejudice. *U.S. v. Brown*, 169 F.3d 344, 350-351 (6th Cir. 1999). Wilson has failed to produce any evidence to refute the trial court's determination that he "vigorously evaded apprehension and discovery by the police for 22 years," although the Court acknowledges that blame can be placed on both parties. The issue, however, is "who is more to blame for that delay." *Doggett v. U.S.*, 505 U.S. 647, 651 112 S.Ct. 2686 (1992). When a defendant is pursued with reasonable diligence, a speedy trial claim must fail. If the "state's pursuit was intentionally dilatory," bad faith weighs in the defendant's favor. Since Wilson's active evasion is more to blame, he is not entitled to relief solely on this prong. Wilson has satisfied the third prong, in that he timely asserted his speedy trial right when he raised a motion to dismiss the indictment immediately prior to his trial. The question of whether Wilson has suffered prejudice as a result of the delay, the fourth prong, depends on who is to blame. "The longer the delay that is traceable to the state's conduct, the more prejudice that will be presumed." In this case, the delay is more due to Wilson's willful evasion of apprehension so he is not entitled to a presumption of prejudice. He must produce evidence showing he was actually prejudiced. A court should look to whether the defendant "has suffered (1) oppressive pretrial incarceration; (2) anxiety and concern; and (3) impairment to his defense." *U.S. v. Brown*, 169 F.3d 344, 350 (6th Cir. 1999). Wilson's only allegation of prejudice is that his father was deceased and could no longer testify as to the cars whereabouts on the day of the murder. It is unlikely that this would change the outlook of the trial.

Out-of-Court Identification: Unusually Long Time to Observe at Time of Crime Outweighs 22-Year Delay in Trying Defendant

Wilson also claims error as to the failure to suppress an out-of-court identification of him by a witness to the crimes. Donnell Watson was a gas station employee. He observed Wilson over a period of 3 hours prior to the commission of the crime while Wilson waited for his father's car to be repaired. In 1973, Watson described the assailant as "5'4" with a big Afro." In 1995, Watson made an out-of-court identification of Wilson when he was shown 2 pictures, one of an African-American with close-cropped hair and the other of an African-American with an Afro (Wilson).

A court confronted with an out-of-court identification due process challenge should focus primarily on the reliability of the evidence. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977). The court should first evaluate the undue suggestiveness of the pre-identification encounters. *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986). If the identification procedures are unduly suggestive, the court should look to whether under the totality of the circumstances, whether the identification was still reliable. Factors to be weighed are the length of observation when the crime was committed, the witness' degree of attention, the accuracy of the witness' prior description, the level of certainty of the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375 (1972).

The Court fails to specify whether the identification procedures were unduly suggestive in Wilson's case, noting that the district court determined that the procedures were unduly suggestive, while the Ohio appeals court did not find them suggestive. Instead the Court proceeds to the inquiry regarding the reliability of Watson's testimony. Watson was able to observe Wilson for 3 hours prior to the commission of the crime, an "unusually long" amount of time. Watson expressed no doubt in his identification of Wilson as the perpetrator of the crime when he made his identification. However, there was 22 years between the identification and the murder. The 6th Circuit ultimately concludes that this is a "close call." However, because of the unusually long length of time Watson had to observe Wilson at the time the crime was committed, the Court ultimately rejects this claim.

U.S. v. Strayhorn
250 F.3d 462 (6th Cir. 5/22/01)

Strayhorn was indicted for conspiracy to possess with intent to distribute and conspiracy to distribute "a measurable quantity of marijuana" between December 1997 and January 1998. He plead guilty, but reserved the right to challenge the amount of drugs attributable to him as relevant conduct under the federal sentencing guidelines. Strayhorn was only willing to accept responsibility for 88 pounds of marijuana. Ultimately in his PSI, the government attributed 414 pounds of marijuana to Strayhorn. Under the sentencing guidelines, Strayhorn's sentence was 4 to 6 years imprisonment. However the statutory minimum sentence for conspiracy to possess 414 pounds of marijuana for a defendant with a prior felony drug conviction is a mandatory minimum of 10 years. Strayhorn was ultimately sentenced to the 10-year mandatory minimum.

Apprendi Violation Can Occur Even if Defendant Has Plead Guilty

On appeal, Strayhorn challenges the attribution of 414 pounds of marijuana to him as a violation of *Apprendi v. N.J.*, 530 U.S. 466, 120 S.Ct. 2348 (2000). An *Apprendi* violation occurs just as readily when a defendant pleads guilty to an unspecified amount of drugs and is sentenced under a pre-

ponderance of the evidence standard as when he or she goes to trial.

Nonmandatory Minimum to Mandatory Minimum Sentence Triggers Analysis

It does not matter that a defendant receives less than the statutory maximum sentence: "aggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater sentence minimum sentence, are now elements of a crime to be charged and proved. " *quoting U.S. v. Ramirez*, 242 F.3d 348, 351-352 (6th Cir. 2001). In Strayhorn's case, the district court's drug quantity finding increased the statutory sentence from a maximum term of 10 years imprisonment to a mandatory minimum sentence of 10 years imprisonment. It is irrelevant that the statutory maximum is equivalent to the mandatory minimum. The district court's finding of drug quantity by a preponderance of the evidence transformed the crime to which Mr. Strayhorn plead guilty (conspiracy to possess 88 pounds of marijuana punishable by a maximum 10 year sentence) into a greater crime for the purposes of sentencing (conspiracy to possess 414 pounds of marijuana punishable by a mandatory minimum of 10 years). Strayhorn's sentence is reversed and remanded.

Fowler v. Collins
2001 U.S. App. Lexis 11542 (6th Cir. +6/4/01)

Waiver of Right to Counsel

This case is a victory for criminal defendants. Fowler received a sentence of 24 years for passing bad checks and for theft by deception in Ohio state court after representing himself at trial. The 6th Circuit holds that Fowler's waiver of his right to counsel was not knowing, intelligent, or voluntary.

At his arraignment the judge asked if Fowler would represent himself. Fowler said yes. Fowler then waived the reading of the Indictment. The trial court then asked if Fowler would waive "the Court's explanation of your Constitutional and statutory rights and privileges as well as an explanation of the pleas available and the meaning of each plea." When Fowler responded affirmatively, the judge then stated, ". . . I'm doing so because I'm confident this defendant understands all of those issues and that he is not being compromised in his knowledge of the Indictment or the information necessary for him to make rational decisions about what plea to enter."

Immediately prior to trial, the judge again spoke with Fowler about his self-representation. When the judge read aloud a waiver of counsel he wanted Fowler sign, Fowler "expressed concern about being unprepared for trial and his lack of access to resources." The court interrupted Fowler and again asked him is he would be representing himself. This time Fowler said yes. Fowler objected to the presence of a public defender at the trial because of an ongoing dispute with that office.

Judge as Protector of Defendant and Investigator of Reasons For Waiver

Under *Faretta v. California*, 422 U.S. 806, 834, 99 S.Ct. 2525 (1975), Fowler's waiver of counsel was invalid. A judge must act as the defendant's protector when inquiring as to his waiver: the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with his eyes wide open." The trial court must "investigate" the circumstances under which the waiver is made: "To be valid the waiver must be made with an apprehension of the nature of the charges, the statutory offense included within them, the range of allowable punishments there under, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S.Ct. 316 (1948).

Waiver of Right to Counsel: Presumption of Invalidity

On habeas review, the presumption must be that the waiver of fundamental constitutional rights was invalid. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938). In this case, the state trial court failed in its duty as Fowler's protector. At arraignment, the judge asked only one time if Fowler was going to represent himself. He asked Fowler to waive the reading of the indictment. He asked Fowler to waive an explanation of his constitutional and statutory rights and privileges. At trial, the court failed to apprise Fowler of the dangers and disadvantages of self-representation. Furthermore, when the trial court read the written waiver he was having Fowler sign aloud, Fowler's response was that he was unprepared and lacked necessary resources.

U.S. v. Martinez, Sauceda
2001 U.S. App. Lexis 12879 (6th Cir. 6/14/01)

Martinez and Sauceda were found guilty of conspiracy to distribute marijuana. Sauceda was also found guilty of possession with intent to distribute marijuana. The district court found by a preponderance of the evidence that Martinez was responsible for 1568.55 kg of marijuana and sentenced him to 210 months imprisonment. The district court found by a preponderance of the evidence that Sauceda was responsible for 1661 kg of marijuana and sentenced him to 240 months imprisonment on both counts, to be served concurrently.

Prosecutorial Misconduct: Improper Vouching vs. Improper Bolstering

Sauceda's first argument on appeal is that the prosecutor improperly vouched for and bolstered the testimony of the government's main witness, informant Ronald Carboni. The following exchange between the prosecutor and Rodney Glendening, a narcotics deputy, occurred:

Prosecutor: "Now you've had the occasion to work with Mr. Carboni not only on this case, but on some other cases?

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Glendening: "Yes, Ma'am."
Prosecutor: "Approximately how many?"
Glendening: "Seven other cases."
Prosecutor: "And what did you find about the information he had provided to you?"
Glendening: "That the information he's provided has always been credible, it's been accurate and truthful."

Improper vouching did not occur because that would require the prosecutor to indicate "a personal belief in the witness's credibility thereby placing the prestige of the U.S. Attorney behind that witness." *U.S. v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999). However, improper bolstering did occur because the prosecutor implied "that the witness's testimony is corroborated by evidence known to the government but not known to the jury." *Id.*, 551. The 6th Circuit notes that "if a prosecutor asks a government agent whether the agent was able to corroborate information provided by an informant, the prosecutor must introduce to the jury how that information was corroborated, *e.g.* via documents or searches." Thus, Glendening should have been asked to explain how he had corroborated information received from Carboni in the 7 other cases.

The fact that improper bolstering occurred is not enough. A defendant must also prove that the improper comments were so flagrant that only a retrial could correct the error. The standard for determining flagrancy is (1) whether the statements misled the jury or prejudiced the defendant; (2) whether the statements were isolated or among a series of improper statements; (3) whether the statements were deliberately or accidentally before the jury; and (4) the total strength of the evidence against the defendant. *Francis*, 549-550. Because in the case at bar, the improper bolstering involved only one comment, and the overwhelming evidence against Sauceda, it does not rise to the standard of flagrancy.

Apprendi Violation Because of "Preponderance of the Evidence" Standard

Both Sauceda and Martinez also claim that their sentences violate *Apprendi v. N.J.*, 530 U.S. 466, 120 S.Ct. 2348 (2000). Despite the fact that the Court can only analyze for plain error since no contemporaneous objection was made, *Apprendi* was violated and re-sentencing is required. Both Sauceda's and Martinez's sentences were based on the district court's finding of drug quantity by preponderance of the evidence. Both men received sentences in excess of the statutory maximum. Under *Apprendi*, any fact other than prior conviction must be submitted to a jury and proven beyond a reasonable doubt if the penalty is increased above the statutory maximum.

Onifer v. Tyszkiewicz
2001 U.S. App. Lexis 13873 (6th Cir. 6/22/01)

Onifer was sentenced to a term of 25 to 50 years imprisonment in 1968 after kidnapping and raping a young girl. In 1972, the prosecutor, impressed by Onifer's prison rehabilitation, moved to reduce his sentence to 5 years. The trial court sustained the motion, and Onifer was immediately paroled. Parole was completed in 1974. In 1975, he abducted, raped, and killed an eleven-year-old girl. Onifer's original sentence was reinstated.

Reviewing Court Only to Look at Law at "Time of the Relevant State-Court Decision"

In this federal habeas case, the 6th Circuit reverses a district court's grant of habeas relief. The district court determined that Onifer's due process rights were violated when his original sentence was reinstated after he was released and completed parole. The district court expressly rejected Onifer's double jeopardy claim. Under *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495 (2000), federal courts on habeas review must look to Supreme Court precedent "at the time of the relevant state-court decision." Onifer's sentence was reinstated by a Michigan trial court in December 1976, and his delayed motion for leave to appeal was denied by the Michigan Supreme Court in 1979. It was not until the U.S. Supreme Court's decision in *U.S. v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426 (1980), that cases such as Onifer's were considered as due process violations rather than double jeopardy violations.

Quintero v. Bell
2001 U.S. App. Lexis 14383 (6th Cir. 6/29/01)

Kentucky Supreme Court Reversed

Quintero and other inmates escaped from Kentucky State Penitentiary in June 1988. He was re-captured and a jury convicted him of second-degree escape and first-degree PFO. He was sentenced to the maximum term of imprisonment, 20 years. Seven of the jurors who convicted and sentenced him had served on the jury that had convicted his co-escapees. Because this was not objected to at trial, the Kentucky Supreme Court, on direct appeal, refused to consider Quintero's fair and impartial jury claim. On state collateral review, the trial court denied his motion for a new trial. This was affirmed by the Kentucky Court of Appeals, and the Kentucky Supreme Court refused to grant discretionary review. On federal habeas review, the district court granted Quintero a conditional writ of habeas corpus because his 6th amendment right to an impartial jury was violated.

Juror Bias Presumed When Jurors Also Convicted Co-Arrestees in Separate Trial

The 6th Circuit affirms the district court's grant of habeas corpus. There is a 6th amendment violation. Although there are no cases on point from any other jurisdictions, the 10th Circuit reversed a conviction in *United States v. Gillis*, 942 F.2d 707 (10th Cir. 1991), where some jurors had sat on a voir dire panel from a criminal defendant's earlier case because there was a risk that the jury was biased due to some of the jurors' exposure to voir dire questions from the earlier case.

The Court notes that the risk of bias in the case at bar is even greater than that in *Gillis*, since in Mr. Quintero's case jurors had not just sat through a related voir dire, but they had also tried and convicted his co-escapees. The Court rejects the Commonwealth's argument that since *Gillis* was decided after Quintero was convicted, the Court is applying new constitutional principles. "The principle of presuming prejudice in extreme cases of jury bias predates Quintero's 1989 conviction." Finally, it is irrelevant that the jury promised to be "fair and impartial." Neither the trial court, the prosecutor, nor the defense attorney, all who were fully aware of 7 of the jurors' prior participation in the co-escapees' trial, ever questioned the jurors about their prior exposure to the case. A "catch-all colloquy was inadequate to wipe away the taint of bias which attached to a jury that included seven members who had previously determined beyond a reasonable doubt that the others who escaped were guilty. . . bias must be presumed."

Ineffective Assistance of Counsel Excuses Procedural Default

Ineffective assistance of trial counsel can serve as cause and prejudice for the procedural default of Quintero's claim in the Kentucky state courts. [The claim was procedurally defaulted because the state courts refused to consider the error since it was not objected to at trial.] The Commonwealth concedes that trial counsel's performance at trial was deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), but argues that it was not prejudicial since Quintero admitted at trial that he had escaped. The 6th Circuit concludes that a finding of actual prejudice is unnecessary in this case, because prejudice can be presumed. "The presence of these jurors and the utter failure by Quintero's trial counsel to contest their presence undermined the entire trial process, such that it lost 'its character as a confrontation between adversaries.'" *quoting U.S. v. Cronic*, 466 U.S. 648, 657, 104 S.Ct. 2039 (1984). This is clearly a structural error requiring a new trial.

Hughes v. U.S.
2001 U.S. App. Lexis 15392 (6th Cir. 7/9/01)

This case involves the issue of whether trial counsel was ineffective when it failed to strike a juror who stated on voir dire that she did not think she could be fair. This case is another victory for our clients. Hughes was charged with robbing a Deputy U.S. Marshal. In response to the judge's question whether jurors thought they could be fair, Juror Orman stated, "I have a nephew on the police force in Wyandotte, and I know a couple of detectives, and I'm quite close to 'em." The Court then asked, "Anything in that relationship that would prevent you from being fair in this case?" Orman replied, "I don't think I could be fair." The Court, "You don't think you could be fair?" Juror Orman, "No." Hughes contends that he asked his attorney to remove Orman for cause. However, Hughes' attorney never questioned Orman, nor attempted to remove her through a cause challenge or a peremptory challenge. Counsel did challenge 2 jurors for cause, and specifically declined the trial court's invitation to challenge others. Trial counsel also failed to exhaust peremptory challenges. Orman did not respond to questions regarding impartiality as a result of Hughes' prior convictions or drug involvement, nor did she respond to a question regarding whether jurors would believe a law enforcement witness over a "civilian" witness.

Great Deference to Trial Counsel's Strategy on Voir Dire: Actual Bias by Juror Required

On review of ineffective assistance of counsel claims, counsel is "accorded particular deference when conducting voir dire." A strategic decision cannot be the basis of an IAC claim "unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997). Likewise, a trial court is granted broad discretion in the conducting of voir dire.

To maintain an IAC claim on failure to challenge a juror, actual bias on the part of the juror must be shown. *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995). Many courts, including the U.S. Supreme Court, have found no actual bias on the part of jurors even when the jurors themselves express doubt in their own impartiality.

Actual Bias Present When No Attempt to Rehabilitate or Clarify Statement of Self-Proclaimed Biased Juror

What sets this case apart, the Court concludes, is "the conspicuous lack of response, by both counsel and the trial judge, to Orman's clear declaration that she did not think she could be a fair juror." Juror rehabilitation through questioning or juror assurances of impartiality are lacking in this case. No attempt to rehabilitate Orman was made by anyone, despite Orman's belief in her own bias against Hughes. Because of Orman's express statement of bias, and the lack of any attempt to clarify the statement either by attorneys or the court, Orman must be found to be actually biased. The Court specifically rejects the state's argument that Orman's silence during group voir dire on other "bias" questions rehabilitates her. Furthermore, the fact that Hughes stated at trial that he was satisfied with his attorney does not enter into the determination of ineffective assistance of counsel.

Judge Siler Dissent: Need to Hear from Trial Attorney

Judge Siler dissents. He is troubled by the lack of sworn testimony in the record from trial counsel concerning why Orman was not stricken. He would remand the case to the district court for a hearing on why counsel did not strike Orman. He believes there could be a number of reasons why Orman would not be stricken.

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McGraw v. Holland
2001 U.S. App. Lexis 15424 (6th Cir. 7/10/01)

Miranda Violation When Teen Pressured by Mom and Detective to Make Statement

In this case, the 6th Circuit breathes new life into *Miranda*. Tina McGraw was 16 years old when she was tried as an adult in Michigan state court on charges relating to a gang rape. A jury convicted her of first-degree criminal sexual conduct. Tina was sentenced to imprisonment for 20-30 years. The Court reverses her conviction because her confession was obtained in violation of her *Miranda* rights.

Tina was arrested at the scene of the rape and taken to police headquarters. When her mother arrived, she was taken into an interview room with her mother and Det. Tamie Reinke. After being advised of her rights, both Tina and her mother signed waivers. Formal interrogation began around 9:40 a.m. and ended at 10:45 a.m. Tina was reluctant to talk about the rape. She asked to postpone the interview and both her mother and the detective told her that she could not. Tina repeatedly expressed her discomfort with making a statement because of fears of retaliation by her co-arrestees. Tina at one point told the detective that she would take all the blame. The detective and Tina's mother refused "to take no for an answer" and Tina, "succumbing at last," gave a detailed confession, admitting that she had held one of the victim's arms down while the victim was repeatedly raped and beaten.

Demand to Stop Interview Not Required- Sufficient to Say Don't Want to Talk About Crime

The state trial court unreasonably applied *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), to the facts of Tina's case. Specifically the state court erred when it held that Tina must have "demanded or requested to terminate the interview." The 6th Circuit holds that Tina's numerous statements that she did not want to talk about the rape was sufficient to invoke her right to remain silent. The 6th Circuit stresses that *Michigan v. Mosley*, 423 U.S. 96, 103-104, 96 S.Ct. 321 (1975), stands for the proposition that the suspect controls "the time at which questioning occurs, **the subjects discussed**, and the duration of the interrogation." Furthermore, when Tina stated that she did not want to talk about the rape, it was improper for the detective to tell her "she had to talk about it."

The Court rejects the federal district court's finding that Tina's requests to remain silent were ambiguous because they were prompted by fear of retaliation by the other suspects.

"Thumbscrews" Not Required for There to Be Coercion

Finally the Court notes that it does not matter that the detective was not being threatening or coercive to Tina. "Nothing resembling the rack and the thumbscrew was employed in this case." While the confession may not have been compelled, its admission at trial is unconstitutional under *Miranda* and its progeny.

Payton v. Brigano
2001 U.S. App. Lexis 15498 (6th Cir. 7/11/01)

Only State Direct Review Delays Running of AEDPA Statute of Limitations

In this federal habeas case, the 6th Circuit re-emphasizes that only state direct review delays the running of the one-year statute of limitations under the AEDPA. All other state court proceedings merely toll the statute of limitations. Furthermore, the fact that a petitioner's ineffective assistance of trial counsel claim can only be raised properly for the first time in a post-conviction proceeding does not make it part of the state direct review process. Even though it can only be raised for the first time in a collateral attack, it cannot be considered direct review so as to begin the one-year statute of limitations under AEDPA.

Clark v. O'Dea
2001 U.S. App. Lexis 15798 (6th Cir. 7/16/01)

Clark and co-defendant Garr Keith Hardin were convicted by a Kentucky jury of first-degree murder in the death of Hardin's girlfriend Rhonda Sue Warford in 1995. Clark was sentenced to life imprisonment.

Evidence of Satanism Admissible to Show Motive in Murder

Clark's first claim on federal habeas review is that the trial court erroneously admitted evidence that he and Hardin were satanists as evidence of their "bad character" in violation of KRE 404(a). At trial several witnesses testified about their satanic worship. The Court ultimately agrees with both the Commonwealth and the Kentucky Supreme Court that the evidence was admissible under KRE 404(b) to support the Commonwealth's theory that "Warford's murder was motivated by the belief of Clark and Hardin that they would gain power by killing her." Any prejudice was alleviated by the fact that defense counsel removed jurors who stated in voir dire "that Clark's possible involvement in satanism would affect their ability to fairly and impartially try the case."

No Improper Joinder When Evidence Not Complex and Defendants Use Each Other as Alibis

Clark also claims that he was improperly joined for trial with Hardin, specifically in light of the fact that most of the satanic evidence related only to Hardin. Two of the Kentucky Supreme Court Justices believed joinder was inappropriate. The 6th Circuit rejects the challenge. First, no mutually antagonistic defenses were presented at trial—in fact both Clark and Hardin used each other as an alibi. Furthermore the testimony about Hardin's satanism did not implicate Clark in the crime and could easily be separated from Clark because the evidence "was not particularly complex." Finally because Clark and Hardin were charged in the same crime, the state had good reason to try them together.

No *Brady* Violation Where Record Not Conclusive As to Whether State Knew of Evidence

Finally, Clark claims error with respect to testimony by an informant, Clifford Capps. Capps, a cellmate, testified that Clark on 2 occasions told him that he had killed Warford, once jokingly, and another time with a serious expression. Clark specifically argues that he was denied a fair trial because the prosecution did not disclose a letter written by Capps to a fellow inmate, Kevin Justis. In the letter, Capps urges Justis to commit perjury by testifying that Hardin jokingly admitted to the murder. This letter was not discovered by Clark until after the verdict. Clark argues he could have used the letter to impeach Capps' credibility.

The state courts found that the Commonwealth had no knowledge of the letter. The 6th Circuit, however, notes "there is evidence in the record strongly suggesting that the state in fact was aware of the existence of Capps' letter." Despite that, the Court ultimately determines that since it is not reviewing the case *de novo* it cannot grant relief to Clark since the record also supports the state court's determination that the Commonwealth was not aware of the existence of the letter. Furthermore, even if the state did know of the letter, the court concludes that habeas relief is not warranted under *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995). Suppression of the letter does not "undermine confidence in the outcome of the trial." The letter did not go to Clark's guilt or innocence. It would only have been useful to impeach Capp's credibility, which Clark did at trial.

Mitchell v. Mason
2001 U.S. App. Lexis 15617 (6th Cir. 7/12/01)

Ineffective Assistance of Counsel Claim Where Defendant Only Briefly Met With Attorney Before Trial

Mitchell was charged with first-degree murder for the death of Raymond Harlin during a fight. On October 6, 1988, Gerald Evelyn was appointed counsel for Mitchell. He represented him at a preliminary hearing on October 14, 1988. He next represented Mitchell four months later during the final hearing before trial. On April 5, 1989, Evelyn was suspended from the practice of law. On May 8, 1989, the day jury selection began in Mitchell's case, Evelyn's license was reinstated.

Evelyn failed to present an opening argument. No witnesses were presented on Mitchell's behalf. Evelyn did move for a directed verdict at the close of the prosecution's case, which the trial court granted to the extent that it reduced the charge to second-degree murder. Evelyn did make a closing argument. Mitchell was convicted and sentenced to 10-15 years imprisonment.

Prior to trial, Mitchell wrote numerous letters to the judge and others requesting a new attorney. He alleged that Evelyn never visited him in prison nor ever spoke to him at court. Eleven days before the trial began, the trial court held a hearing on Mitchell's motion for a new attorney, Mitchell having received a letter from Evelyn advising him of his suspension from the practice of law. Evelyn did not appear. The trial court took the matter under advisement.

On the second day of jury selection, Mitchell again moved for a new attorney. Evelyn told the court that the motion was made because he had failed to visit Mitchell the night before as promised. The motion was denied.

On the sixth day of trial, Evelyn told the court that he had received a grievance letter filed by Mitchell with the bar association. He offered to withdraw as counsel, but Mitchell waived his removal.

Six Minutes With Client Pre-Trial is "Complete Denial of Counsel"

On habeas review, the district court granted Mitchell's petition. The 6th Circuit affirms. The Court first notes that this case follows under the "per se" ineffective assistance of counsel rule established by the U.S. Supreme Court in *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). *Cronic* stands for the proposition that reversal is required without a showing of prejudice to the defendant when "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.*, 466 at 659, n. 25. The Court holds that the undisputed amount of time that Evelyn spent with Mitchell prior to trial, six minutes spanning 3 separate meetings, coupled with Evelyn's suspension from law for a month immediately prior to Mitchell's trial, constitutes "a complete denial of counsel at a critical stage of the proceedings." Application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), is unnecessary because prejudice is presumed. The pre-trial period, the Court stresses, is of critical importance to a defendant. Consultation and investigation are necessary. Furthermore investigation depends on information provided by a defendant to his lawyer. An attorney has a duty to his client to investigate. *Strickland*, 466 U.S. at 691. ■

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PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Kyllo v. United States

__ U.S. __ , 121 S.Ct. 2038, 150 L.Ed 2d 94, (2001)

"In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes…We have said that the Fourth Amendment draws 'a firm line at the entrance to the house,' *Payton*, 100 S.Ct. 1371, 1382; 63 L.Ed.2d 639, 653; 445 U.S. 573, at 590. That line, we think, must be notably firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no 'significant' compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward."

The question is simple: does the use of a thermal-imaging device to detect heat emanating from a house constitute a search requiring a warrant? Or, is the use of the thermal-imaging device simply the measurement of heat coming out of the outside of a home and thus not constituting a search?

This case arose when agents with the Department of the Interior received information that Kyllo was growing marijuana at his home. Agents Elliott and Hass used a thermal-imaging device to scan the triplex in which Kyllo lived, without a warrant. The device told the agents that the roof over the garage and a side wall were hotter than the rest of Kyllo's home, and significantly hotter than the other two units in the triplex. The agents used this information, in addition to other information to obtain a warrant. As a result, Kyllo was indicted for manufacturing marijuana, moved to suppress, and when he lost, entered a conditional plea of guilty.

The 9th Circuit initially sent the case back for an evidentiary hearing. The district court found that the thermal-imaging device used, an Agema 210, "'is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house'…it 'did not show any people or activity within the walls of the structure.'" The 9th Circuit then held that Kyllo had "shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home…and even if he had, there was no objectively reasonable expectation of privacy because the imager 'did not expose any intimate details of Kyllo's life,' only 'amorphous "hot spots" on the roof and exterior wall.'"

The United States Supreme Court reversed the 9th Circuit and held that the use of a thermal-imaging device is indeed a search. In a 5-4 decision written by Justice Scalia, the Court affirmed the previous landmark decision of *Katz v. United States*, 88 S.Ct. 507; 19 L.Ed.2d 576; 389 U.S. 347 (1967). "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,'…constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search."

The majority reaffirmed the Court's somewhat consistent dedication to the home as the core value of the Fourth Amendment. A second theme that is a favorite of Justice Scalia's is the use of the intent of the Framers to interpret the Fourth Amendment. In reaffirming *Katz*, the majority was also concerned about the development of new technologies that could encroach upon the core value of the Fourth Amendment.

The dissent was written by Justice Stevens. In his view, there was no search. Rather, the heat that emanated from the house was exposed to the public, and the police merely measured it. "All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others.

One fascinating facet of this case is the split in the vote. Justice Scalia, joined by Justices Thomas, Souter, Ginsburg, and Breyer, wrote the majority opinion; Justice Stevens' dissent was joined by Justices Rehnquist, O'Connor, and Kennedy. I have read some analyses that says that *Bush v. Gore*, 121 S.Ct. 525; 148 L.Ed.2d 388; 531 U.S. 98 (2000) has caused many on the Court to alter long-term alliances and beliefs. That may be. What is clear is that the split on this particular case was unexpected.

Florida v. Thomas

__ U.S. __, 121 S.Ct. 1905, 150 L.Ed.2d 1 (2001)

This case promised to answer an important Fourth Amendment question. The Florida Supreme Court had interpreted *New York v. Belton*, 101 S.Ct. 2860; 69 L.Ed.2d 768; 453 U.S. 454 (1981) to allowing for a search of the interior of a case only where the police had made contact with the defendant while in the car. In *Thomas*, the driver left the car and was contacted, and arrested, at the rear of the car. The Florida Second District had overruled the trial court decision sup-

pressing the evidence, holding that the search was valid under *Belton*. The Florida Supreme Court reversed, holding that "'Belton's bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant' while the defendant remains in the car."

However, the promise was not realized. The Court decided for a number of reasons that it did not have jurisdiction of the case. We will have to wait until later to see whether *Belton* will be restricted.

Saucier v. Katz

__ U.S. __ , 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)

This case enters the complex and arcane area of civil rights litigation and qualified immunity, touching only lightly on Fourth Amendment considerations. The question considered was "whether the requisite analysis to determine qualified immunity is so intertwined with the question whether the officer used excessive force in making the arrest that qualified immunity and constitutional violation issues should be treated as one question, to be decided by the trier of fact...We now reverse and hold that the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest."

The case arose during an appearance by Vice President Gore in 1994 at an Army Base. An animal rights activist, Elliot Katz, attempted to unfurl a banner in the Vice President's presence, and two officers dragged him away and placed him into a van, took him to the police station, held him for a brief period of time, and then released him. Katz filed a lawsuit in federal district court pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 91 S.Ct. 1999; 29 L.Ed.2d 619; 403 U.S. 388 (1971). The district court granted a motion for summary judgment on grounds of qualified immunity except for the claim of excessive force against Saunier. The district court held that a material issue of disputed fact remained. Saucier filed an interlocutory appeal to the 9th Circuit, which affirmed the denial of the summary judgment of the lower court. Saucier then obtained *certiorari* review from the US Supreme Court.

Justice Kennedy wrote the decision for the majority. In his opinion, he wrote a virtual primer for understanding the issue of qualified immunity as a defense to a civil rights action. The Court stated that when qualified immunity is sought, "a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." The Court considering the qualified immunity question decides the question of whether the "facts alleged show the officer's conduct violated a constitutional right" in the "light most favorable to the party asserting the injury." "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." If the constitutional violation could be proven, "the next, sequential step is to ask whether the right was clearly established…in light of the specific context of the case, not as a broad general proposition." "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted…If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."

Based upon this standard, the Court applied it to the facts of this case and reversed the 9th Circuit. "[W]e will assume a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force, then proceed to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances this officer faced…A reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses…Pushes and shoves, like other police conduct, must be judged under the Fourth Amendment standard of reasonableness." Accordingly, Saucier was entitled to qualified immunity and the lawsuit should have been dismissed at the motion for summary judgment stage.

Justice Ginsburg dissented, joined by Justices Stevens and Breyer. The dissent agreed with the outcome of the majority opinion, but differed with the reasoning used. In essence, the dissent agreed with the 9th Circuit: "the determination of police misconduct in excessive force cases and the availability of qualified immunity both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful?"

Justice Souter concurred in part of the Court's opinion, but would have remanded the case for application of the qualified immunity standard.

Arkansas v. Sullivan

__ U.S. __, 121 S.Ct. 1876, 149 L.Ed.2d 944 (2001)

The Court has issued a per curiam decision in the last month-and-a-half of the term reaffirming *Whren v. United States*, 116 S.Ct. 1769; 135 L.Ed.2d 89; 517 U.S. 806 (1996).

Officer Taylor pulled Sullivan over for speeding and for having an improperly tinted windshield. When he asked Sullivan for his license, Taylor realized that he was aware of "'" intelligence on [Sullivan] regarding narcotics."'" Taylor also saw a rusted roofing hatchet when Sullivan opened the door to try to find his registration. Taylor arrested Sullivan for speeding, driving without registration and insurance documentation, improper window tinting, and carrying a weapon.

The trial court suppressed the evidence. On the state's interlocutory appeal, the lower court affirmed, as did the Arkansas Supreme Court. The Arkansas Supreme Court held that the arrest had been pretextual, that the officer's motivation

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did matter, that what *Whren* had said about pretext had been "dicta", and that they could interpret the Fourth Amendment more broadly than the Supreme Court.

The US Supreme Court was not happy. The Court granted *certiorari* and unanimously reversed without argument. The Court reaffirmed *Whren*, and noted further that they had recently done so in *Atwater v. Lago Vista*, 121 S.Ct. 1536; 149 L.Ed.2d 549; __ U.S. __ (2001), the case holding that the arrest for a fine-only offense of failing to have a child in a seat belt was legal. Further, the Court reaffirmed *Oregon v. Hass*, 95 S.Ct. 1215; 43 L.Ed.2d 570; 420 U.S. 714 (1975) that "while 'a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,' it 'may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.'"

Justices Ginsburg, Stevens, O'Connor, and Breyer, joined in a concurrence, the purpose of which was to warn that if *Atwater* resulted in "'anything like an epidemic of unnecessary minor-offense arrests'…I hope the Court will reconsider its recent precedent."

United States v. Salgado
250 F.3d 438
(5/18/2001)

The facts are long and complex and not required to understand the holding of the Sixth Circuit in this case. This originated with a cocaine trafficking conspiracy involving multiple people, vehicles, and apartments. At some point, the police found a key in a Mustang that the police believed was used to transport cocaine. It was parked in Jambu's apartment complex parking lot in Louisville, Kentucky. Because the police were investigating whether the car was connected to Jambu, they sought to know whether the key was to Jambu's apartment. The police officer took the key and tried the key in the front door of Jambu's apartment. The key matched; the police did not open the door or go into the apartment. Jambu raised the question of whether the fact that the key found in the Mustang matched Jambu's apartment door should have been suppressed. The district court denied the motion to suppress.

Judge Graham wrote the opinion for the Sixth Circuit. The Court, relying upon *United States v. DeBardeleben*, 740 F. 2d 440 (6th Cir. 1984), *cert. den.*, 105 S.Ct. 448; 83 L.Ed.2d 373; 469 U.S. 1028 (1984), affirmed the district judge. "[T]he mere insertion of a key into a lock, by an officer who lawfully possesses the key and is in a location where he has a right to be, to determine whether the key operates the lock, is not a search. That is what happened in the case before us."

Commonwealth v. Fox
2001 Ky. LEXIS 114
(Not Yet Final)
(6/14/2001)

Fox parked his truck at a Shell Mart in Beattyville, Kentucky. Peters was a passenger. He got out of his truck, saw two police officers nearby, got back into his truck and drove away. The police, who knew that Fox had previous drug charges, noticed that he had a child in the back of the truck who was not restrained properly. The officers stopped Fox and asked him what was in bags in the truck bed. Fox initially allowed the officers to search the bags, but then grabbed the bag back. The officer took the bag and searched it and found prescription bottles, needles, and stolen property. Fox and Peters were charged, but the evidence was suppressed by the trial court. The Court of Appeals affirmed, holding that "KRS 189.125(7) prohibits law enforcement officers from stopping an automobile solely for the failure to secure a child in a child restraint system which is required by KRS 189.125(3)." The Kentucky Supreme Court granted discretionary review.

The Court issued a unanimous decision written by Justice Wintersheimer. Their primary holding was that "a law enforcement officer may stop a vehicle based solely upon a failure to secure a child of less than 40 inches in height in accordance with KRS 189.125."

The holding was based upon statutory history. The Court found that the latest version of the statute had ensured that while a seat belt offense was not a primary offense, the failure to properly secure a child of 40 inches or less was an offense which carries a $50 fine. "The attention given to seat belt safety requirement by the General Assembly demonstrates that the public policy has developed to a point where the protection of children has been declared and the intent to treat them differently from adults…KRS 189.125(3) creates a crime for failure to properly restrain a child less than 40 inches in height and the police may properly stop such a vehicle when they observe the violation of the statute."

However, the Court granted relief to Fox. The Court agreed with the trial court that Fox has rescinded any consent to search when he took back the bag from the officer. Thus, the officer needed to obtain a warrant to search the bag. "[A] reasonable person would have understood that Fox was terminating the consent to search when he closed the bag and put it in the back of the truck. When the police noticed the prescription drug bottle, not an inherently contraband item, a search warrant was required to examine its contents. The decision of the trial judge to suppress the evidence and its affirmance by the Court of Appeals should not be disturbed because there was no abuse of discretion…When Fox withdrrew his consent to search, a search warrant should have been obtained."

Finally, the Court held that Peters, the passenger in the truck, did not have standing to challenge the search of the truck, citing *Rakas v. Illinois*, 99 S.Ct. 421; 58 L.Ed.2d 387; 439 U.S. 128 (1978).

SHORT VIEW . . .

1. The Supreme Court of the United States has now taken its summer break. This past year featured a large number of Fourth Amendment cases. An interesting article has appeared in the National Law Journal reflecting on this past year. "U.S. Supreme Court's Fourth Amendment Decisions Puzzle Experts," *The National Law Journal*, June 18, 2001. The article notes that there is more confusion than consistency in this year's Fourth Amendment jurisprudence. "For example, Justice John Paul Stevens, the Court's most liberal member, was joined by conservatives—Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Anthony M. Kennedy—in dissenting from the decision written by the very conservative Justice Antonin Scalia that the use of the thermal-imaging device was an unreasonable search without a warrant. *Kyllo v. U.s.*, 121 S.Ct. 2038; 150 L.Ed.2d 94; __ U.S. __ (2001). And it was the more liberal Justice David H. Souter who wrote the opinion allowing warrantless arrests of citizens for misdemeanor, fine-only offenses, while Justice O'Connor led the dissenters. *Atwater v. City of Lago Vista*, 121 S.Ct. 1536; 149 L.Ed.2d 549; __ U.S. __ (2001). Amidst the confusion, however, the author spots some trends. This term gives signals that the Court is preparing to back away from the reasonableness/balancing approach particularly where the home is involved. *Kyllo*, the infrared thermal-imaging device case, *City of Indianapolis v. Edmond*, 121 S.Ct. 447; 148 L.Ed.2d 333; 531 U.S. 32 (2000), in which the Court ruled that drug roadblocks are illegal, and *Ferguson v. City of Charleston*, 121 S.Ct. 1281; 149 L.Ed.2d 205; __ U.S. __ (2001), all indicated to the author this particular trend. "'In a way, the question in this era of drugs—and so many of these cases are driven by drugs—is: Are we still going to require what we traditionally view as cause for police action?…It really seems as if the Court has been saying yes and is moving away from the reasonableness balancing approach when no warrant is present. If you view it that way, then *Edmond* falls into place along with *Ferguson* and *Kyllo*.'" The author also contended, and several commentators agreed, that *Atwater v. City of Lago Vista* was the worst of the bunch. "'It is the worst decision the Court has rendered in 20 years; it's just a disaster,' says William A. Schroeder of Southern Illinois University School of Law. And it may also be the term's Fourth Amendment decision with the greatest impact, adds Thomas Davies of the University of Tennessee College of Law. 'It puts no constitutional restrictions at all on police officers' authority to arrest for even the most minor offense," says Professor Davies."

2. The Racial Profiling Act is now law in this Commonwealth. It is Senate Bill 76, sponsored by Senator Gerald Neal. Located in KRS 15A, the first section reads: "(1) NO STATE LAW ENFORCEMENT AGENCY OR OFFICIAL SHALL STOP, DETAIN, OR SEARCH ANY PERSON WHEN SUCH ACTION IS SOLELY MOTIVATED BY CONSIDERATION OF RACE, COLOR, OR ETHNICITY, AND THE ACTION WOULD CONSTITUTE A VIOLATION OF THE CIVIL RIGHTS OF THE PERSON." The remainder of the new statute speaks of the writing and promulgating of a model policy, the creation of a personnel sanction for violation of the policy, and the distribution of funds for noncompliance with the model policy. What I think is fascinating about this new statute is that as I read it, violation could lead to the exclusion of evidence. There is no specific remedy included in the statute. However, the exclusionary rule is intended to deter police misconduct. The Racial Profiling Act is likewise intended to deter specific police misconduct, that is the illegal stopping, detaining, or searching of persons when the action is solely motivated by racial considerations. I submit that counsel for the defense should begin to look at this issue and specifically look for pretextual stopping. It may be that while *Whren* says that pretext does not matter, Senate Bill 76 says that it does and in Kentucky a pretextual stopping should lead to suppression of the evidence. Motions to suppress for violation of this specific statute should follow. Please keep me apprised of any developments at the trial court level.

3. *Wilson v. State*, 745 N.E.2d 789 (Ind. 4/16/01). The Indiana Supreme Court has held that while a police officer may frisk a motorist prior to placing her into a police car, the officer may not place the motorist into the police car unless it is "reasonably necessary" to do so under the circumstances. Under *Florida v. Royer*, 103 S.Ct. 1319; 75 L.Ed.2d 229; 460 U.S. 491 (1983), a police officer "is not using the least intrusive means to investigate a traffic stop if, without a particularized justification making it reasonably necessary, he places a person into his patrol vehicle and thereby subjects the person to a pat-down search."

4. *Brown v. State*, 2001 Fla. App. LEXIS 4479 (Fla. Ct. App. 4/6/01). A driver cannot give legal consent to a search of a passenger's fanny pack left behind by the passenger when asked to leave the car by the police. The court found it significant that the officer had seen the fanny pack on the passenger's lap when he asked her to get out of the car. It was not a reasonable assumption that the male driver shared use and joint access and control of the fanny pack at the time of the alleged consent.

5. *Yancey v. State*, 44 S.W.3d 315 (Ark. 5/24/01). A game warden saw two men carrying water containers to plants

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that appeared to be marijuana. He told the state police of the fact, who obtained warrants to search the men's' homes. Marijuana was found, the men were charged, and their suppression motion was lost. The Arkansas Supreme Court held, however, that the warrants were illegal due to there being no probable cause that there would be marijuana found at the men's homes. The Court discounted the inference that someone who grows marijuana in a field will also have marijuana at his home located miles away. In this particular instance, however, the holding did not benefit the defendants; the Court ruled that the evidence could come in under the good-faith exception to the warrant requirement.

6. *State v. Kubit*, 627 N.W.2d 914 (Iowa, 5/31/01). The police who have an arrest warrant for a person residing in a motel room may not force the person answering the door to move back into the motel room when she is attempting to come outside. Thus, evidence found inside the motel room in plain view should have been suppressed by the trial court. "[W]hen the officers waited until Kubit actually answered the door and stepped out—there was no longer any right or necessity to forcibly enter to find a suspect. As such, because Kubit complied with the knock, it was not reasonable for police to force her back inside."

7. *State v. Lozada*, 748 N.E.2d 520 (Ohio, 6/20/01). In a case similar to *Wilson* above, the Ohio court held that the police may not as a matter of course take a person who has been stopped for speeding and place him in the police car preceded by a frisk, unless that is the least intrusive means to avoid a dangerous condition. "[D]uring a routine traffic stop, it is reasonable for an officer to search the driver for weapons before placing the driver in a patrol car, if placing the driver in the patrol car during the investigation prevents officers or the driver from being subjected to a dangerous condition and placing the driver in the patrol car is the least intrusive means to avoid the dangerous condition."

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National Bipartisan Groups Call for Reforms and Recommends Against Death Penalty for Children

There is emerging national agreement that the death penalty should be eliminated for children.

A 1988 report of the Criminal Justice Section of the ABA stated, "The spectacle of our society seeking legal vengeance through execution of a child should not be countenanced by the ABA."

The ABA approved the following resolution: "That the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of 18." http://www.abanet.org/scripts/PrintView.asp

The 1997 ABA Call for a Moratorium was based in part on the fact that states continue to sentence children to death.

After a year of study, a distinguished bipartisan blue ribbon committee of The Constitution Project called for 18 reforms in the death penalty. Entitled *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001) http://www.constitutionproject.org/dpi/Mandatory_Justice_7-05-01.PDF, the report details recommendations that relate to various aspects of capital punishment.

Among other things, the reforms call for elimination of the death penalty for those under 18 stating, "To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment to exclude those involving … (2) persons under the age of eighteen at the time of the crimes for which they were convicted…."

The Constitution Project's 30-member death penalty initiative group has members that are supporters and opponents of the death penalty, Republicans and Democrats, conservatives and liberals.

PRACTICE CORNER

LITIGATION TIPS & COMMENTS COLLECTED BY MISTY DUGGER

Misty Dugger

USE *APPRENDI* TO CHALLENGE INDICTMENT IN JUVENILE TRANSFER CASES WHEN GRAND JURY FAILS TO FIND THAT A FIREARM WAS USED IN CRIME

When a juvenile is to be transferred to adult court under KRS 635.020(4) for use of a firearm during the commission of a felony, challenge the constitutionality of the transfer statute on the grounds that it violates the client's right to a jury trial. As discussed in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the court held that a jury must find, beyond a reasonable doubt, any fact that would expose the defendant to a sentence over and above the statutory maximum for the offense. In this case, the defendant's criminal liability itself turns on whether the crime involved the "use of a firearm." Under Kentucky law, that fact is only to be presented to the district judge, and must only be proved by probable cause. Consequently, there is a substantial risk that juveniles who would ordinarily be shielded from criminal liability for their conduct will have to do adult time based purely on a mistaken factual assumption. *Apprendi* would appear to prohibit a state from creating such a situation.

A couple of pointers about preserving this issue: First, you MUST notify the Attorney General on any motion challenging the constitutionality of the statute. *See* CR 24.03. Serve them when you file the motion! Second, if you lose your motion in the district court, you must raise the issue again in the circuit court - this time as a motion to remand the case to juvenile court for want of subject matter jurisdiction. (Again, serve the Attorney General when you do that). In this motion in the circuit court, you can add as an additional grounds for remand that the Grand Jury did not indict on the "element" of "use of a firearm" - another *Apprendi* requirement. Finally, assuming you've lost your motion in both courts, you may want to consider actually asking for a special jury instruction specifically on the "use of a firearm" element.

~ Tim Arnold,
Juvenile Post Disposition Branch, Frankfort

Pre-Arrest/Pre-Miranda Silence Cannot Be Used in the Prosecution's Case-in-Chief

In *Coyle v. Combs*, 205 F.3d 269 (6th Cir. 2000), the Sixth Circuit, following *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) and its progeny, held that pre-arrest/pre-*Miranda* silence can not be used in the prosecution's case-in-chief. However, if the defendant testifies, the pre-arrest/pre-*Miranda* silence can be used for impeachment purposes.

The *Combs* situation differs from *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), which prohibits evidence concerning post-arrest/post-Miranda silence for any purpose. Obviously, the distinction between *Combs* and *Doyle* may have a major impact on the decision as to whether the defendant should testify.

In *Combs*, the defendant admitted that he killed two people. While Combs was sitting on the ground, after having been shot himself, a police officer asked Combs what had happened and Combs replied "the guy shot me." Later, while Combs was being placed in an ambulance, the police officer again asked what had happened. Combs told the officer to talk to his lawyer. Even though Combs did not testify at trial, the two exchanges between the police officer and Combs were related to the jury, without objection, during the prosecution's case-in-chief. The Sixth Circuit held that trial counsel was ineffective for failing to object to this testimony and issued a writ of *habeas corpus*.

It is instructive to note that total muteness is not required to trigger the right to remain silent. While the parameters of this right have not been fully explored, it is advisable that an objection be lodged if the Commonwealth attempts to elicit testimony about any aspect of a statement which the defendant has refused an answer, even if the statement or confession is otherwise comprehensive.

~ Richard Hoffman, Appeals Branch, Frankfort

Failure to File Notice of Appeal May Equal Ineffective Assistance of Counsel Based Upon Ethical and Constitutional Considerations

The ethical standards of professional conduct, the Sixth Amendment, and §115 of the Kentucky Constitution all provide provisions requiring counsel to effectively communicate the appellate process and the client's options following a conviction. Both the ABA Model Code of Professional Responsibility and the ABA Standards for Criminal Justice require trial counsel to inform the client of the right to appeal and the consequences. The ABA Standards for Criminal Justice explicitly require that trial counsel should give a professional judgement on the merits of both potential grounds and results of the appeal, should explain the advantages or disadvantages in appealing, and should take whatever steps are necessary to protect the client's right to appeal.

These ethical standards place an affirmative duty on trial counsel to discuss the procedures, merits, and consequences

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of taking an appeal from a criminal conviction. Yet, in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct.1029, 145 L.Ed.2d 985 (2000), the Supreme Court refused to incorporate comparable ethical standards into the Sixth Amendment guarantee of effective assistance of counsel on appeal.

Flores-Ortega had pled guilty to second-degree murder pursuant to a plea bargain. Four months after sentencing, Flores-Ortega unsuccessfully attempted to file an untimely notice of appeal. Later he filed a *habeas* petition pursuant to 28 U.S.C. § 2244 alleging that he was denied his right to effective assistance of counsel on appeal based upon his trial counsel's failure to file a notice of appeal.

The Supreme Court granted *certiorari* to resolve a conflict in the circuit courts regarding the issue of when a defendant is denied the Sixth Amendment right to effective assistance of counsel based on the failure to file a notice of appeal. The Court applied the *Strickland v. Washington*, 466 U.S. 668 (1984) test which requires a showing that counsel's representation fell below an objective standard of reasonableness and a showing that the deficient performance prejudiced the defendant. In applying the first prong, the Court indicated that a lawyer who disregards specific instructions from a client to file a notice of appeal acts in a professionally unreasonable manner. When there is not a specific request by the defendant to file a notice of appeal, the Court indicated that the issue developed into whether or not counsel discussed the possibility of an appeal with the client. However, the Court refused to impose an affirmative duty on counsel to have such a discussion in all cases, indicating that such a requirement was not consistent with the general reasonableness standard applicable to the Sixth Amendment. Instead, the Court held that counsel had a constitutionally imposed duty to consult with the defendant about an appeal when (1) a rational defendant would want to appeal or (2) this particular defendant reasonably demonstrated to counsel that he was interested in appealing. The *Flores-Ortega* Court found the record insufficient to make this determination and remanded for additional findings.

In contrast to the Sixth Amendment right to counsel, Section §115 of the Kentucky Constitution specifically provides that a citizen "shall be allowed as a matter of right at least one appeal to another court." Consequently, the decision not to appeal a criminal conviction involves the specific waiver of this constitutional right.

From a practical standpoint, the rules of ethics and the state constitution require a higher standard on counsel than does the Sixth Amendment. To avoid potential ethical problems or complaints, trial counsel should take the time and briefly explain to the client both the appellate process and the likelihood of success of appeal. Although the ethical standards generally require that this be done after the sentence is imposed, it also makes sense to do it at the time that a plea offer is considered. If an appeal is not part of the plea bargain or will interfere with the bargain, the client needs to know that before accepting the prosecutor's offer.

~ Submitted by Rebecca DiLoreto,
Post-Trials Division Director, Frankfort

~ Text adapted from Metos, Fred G., "APPELLATE ADVOCACY, Failing to File the Notice of Appeal: Ethical and Constitutional Considerations", *The Champion*, (NACDL October 2000): 52-55.

Practice Corner needs your tips, too.

If you have a practice tip, courtroom observation, or comment to share with other public defenders, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us.

AmeriCorps Award to DPA Law Clerk

Forrest Brock

DPA Law Clerk Forrest Brock of Brandeis School of Law was awarded $1,000 for his SummerCorps Internship, serving the Department of Public Advocacy's Trial Hazard Office.

The Summer Corp Internship is an AmeriCorps funded program for first and second year law students who have secured internships at non-profit organizations and who spend the summer providing direct legal services to low income and other under-served communities in exchange for 381 hours of service.

As DPA continues to develop the Law Clerk Program, by placing interns in under-served communities, we look forward to having continued support from the AmeriCorps funded program for qualifying law students.

Gill Pilati

Forrest, congratulations for returning to your birthplace and serving your community well! ■

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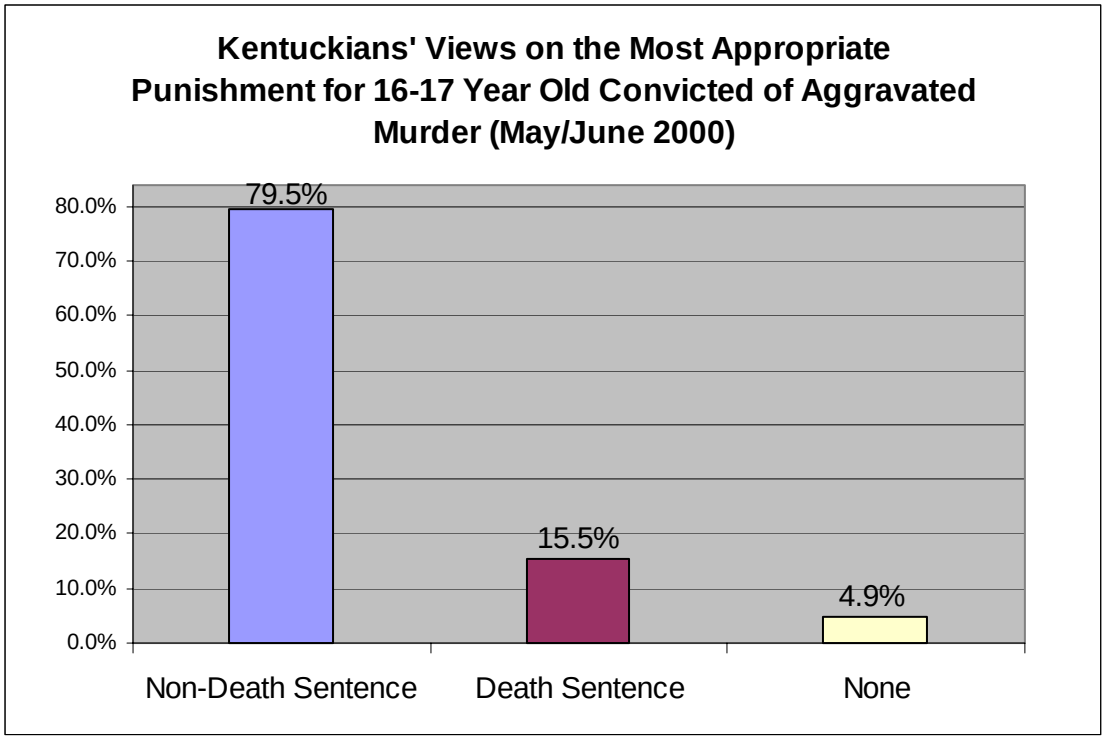
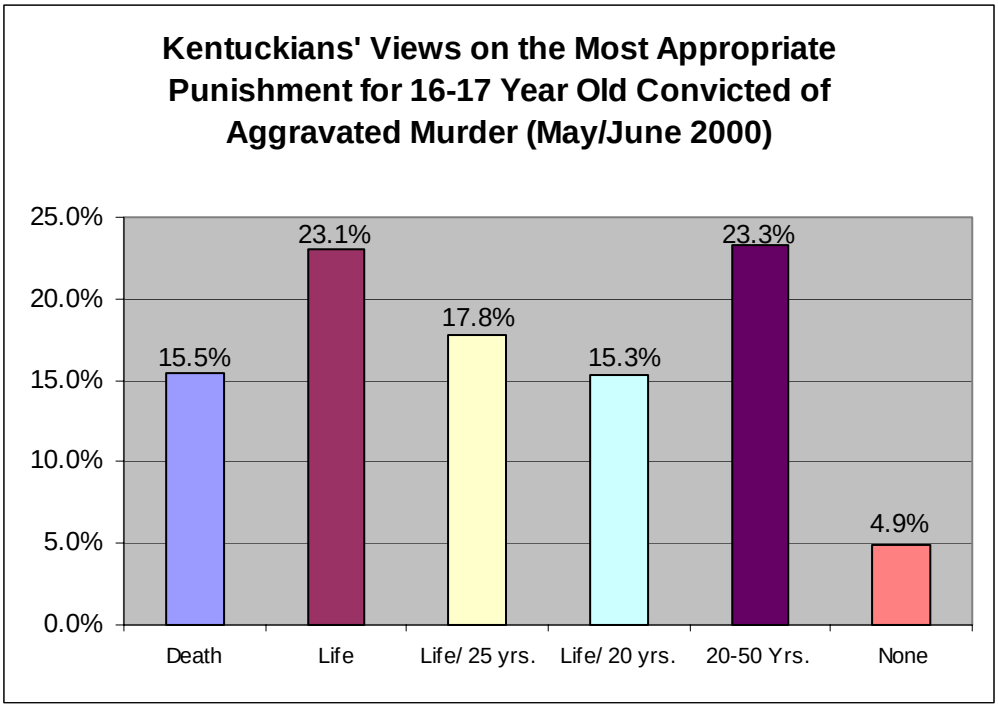
Question asked by the UK Survey Research Center's *Spring 2000 Kentucky Survey* of 1,070 Kentuckians 18 years of age or older from May 18 - June 26, 2000.
The margin of error is ± 3% at the 95% confidence level. Households were selected using random-digit dialing, a procedure giving every residential telephone line in Kentucky an equal probability of being called.





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For more information regarding NCDC programs call Rosie Flanagan at Tel: (912) 746-4151; Fax: (912) 743-0160 or write NCDC, c/o Mercer Law School, Macon, Georgia 31207.

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